

**INVESTIGATING THE BRITISH ASYLUM SYSTEM FOR  
LESBIAN, GAY AND BISEXUAL ASYLUM-SEEKERS:  
THEORETICAL AND EMPIRICAL PERSPECTIVES ON  
FAIRNESS**

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by

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## ABSTRACT

The entitlement of lesbian, gay and bisexual (LGB) individuals to claim asylum on the basis of their sexual identities has been a contentious matter, as sexual identity was not a ground of claim explicitly recognised under the 1951 Refugee Convention. Nonetheless, the United Kingdom (UK) has incrementally recognised the ability of LGB asylum-seekers to claim such protection over the last twenty years.<sup>1</sup>

This thesis undertakes a socio-legal investigation of the British asylum system from the perspective of LGB asylum-seekers. Using evaluation theory, it examines the fairness with which LGB asylum claims are treated in the UK, and the standards to which they are entitled. As the starting point, this thesis explores the legitimacy of using fairness as its standard, and examines the content of this standard. From this, it advances ‘structural principles’ that are used to examine the British asylum system since the UK Supreme Court’s seminal decision in *HJ (Iran)*. Investigating the British asylum system through the framework provided by the structural principles is supported by qualitative data obtained from interviews conducted with legal practitioners, activists, academics, decision-makers and asylum-seekers, and from replies to the Freedom of Information requests addressed to the Home Office. This has helped to conduct a substantial analysis of the British asylum system, as experienced by LGB asylum-seekers today. It offers tangible praise, critique and recommendations with respect to their treatment regarding matters of procedural fairness, i.e., that relating to the asylum process itself, and substantive fairness, i.e., matters pertaining to the outcome of the claim for protection.

This thesis submits that intersectionality and the diversity of sexual identity should be at the core of an asylum system that deals fairly with LGB claims for asylum in the UK. LGB asylum-seekers require access to an asylum system that is sensitive and empathetic to their experiences, and which avoids essentialising sexual identities and conducting ‘single-axis’ analyses. The system must operate with flexibility, in line with the unique needs and experiences of LGB asylum-seekers, and with respect for their fundamental rights.

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<sup>1</sup> *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31.

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Tawseef (March 2016)

## Chapter One

### INTRODUCTION

#### 1. Introduction

The area of sexual identity-based asylum has remained a contentious area of refugee protection since the UK accepted that lesbian, gay and bisexual (LGB) individuals could make such claims. This thesis aims to investigate asylum claims made in the UK on grounds of sexual identity for their fairness. This introduction will set out the context and research questions in more detail before outlining the methodology of the investigation.

#### 2. The Context of Sexual Identity-Based Asylum

Over the last twenty years, traditional asylum-receiving countries have recognised that individuals fleeing maltreatment on the basis of their sexual identities are capable of making successful asylum claims for protection. To do so they must hold a well-founded fear of being persecuted in their country of origin for this reason. Such countries have included the United States of America (US), Australia, Canada, and the United Kingdom (UK).<sup>1</sup> In the absence of a clearly espoused category for LGB claimants, these claims have been processed under the ‘particular social group’ category. The category was devised for this very reason, to encompass claims based on grounds for which the existing terms of the 1951 Convention relating to the Status of Refugees (Refugee Convention)<sup>2</sup> did not provide.<sup>3</sup>

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<sup>1</sup> Amnesty International, ‘Crimes of Hate, Conspiracy of Silence: Torture and Ill-Treatment Based on Sexual Identity’ (2001) 26. By 2001, 18 countries had granted refugee protection on the basis of the claimant’s sexual identity.

<sup>2</sup> ‘Convention Relating to the Status of Refugees’ (Adopted 28 July 1951, Entered into Force 22 April 1954) 189 UNTS 137.

Within this group of asylum-receiving countries, the UK's recognition that LGB individuals are entitled to refugee status has perhaps been the most begrudging. The UK authorities did not grant asylum status on this basis until 1998.<sup>4</sup> In subsequent years, however, the British approach has evolved to render the UK one of the best places to seek asylum on the grounds of one's sexual identity. It currently professes one of the most advanced bodies of case-law and policies on this area amongst traditional asylum-receiving countries.<sup>5</sup>

For example, at the Home Office, caseworkers are trained on dealing with sexual identity in the asylum context.<sup>6</sup> Decision-makers have recourse to Asylum Policy Instructions that were formulated specifically to address sexual identity-based claims.<sup>7</sup> Where possible, Country of Origin Information reports have been developed to include sections describing life for LGB individuals in those particular societies.

Moreover, in 2010, the UK Supreme Court (UKSC) released its decision in *HJ (Iran) v. Secretary of State for the Home Department (HJ (Iran))*, which removed discretion from the determination procedure.<sup>8</sup> Decision-makers had until then used discretion to argue that LGB asylum-seekers could eliminate the risk of persecution by 'acting discreetly' in their home societies.<sup>9</sup> The UKSC held that decision-makers could not deny LGB claimants protection by contending that it would be 'reasonably tolerable'

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<sup>3</sup> UN High Commissioner for Refugees (UNHCR), 'Guidelines on International Protection No. 2: "Membership of a Particular Social Group" within the Context of Article 1A (2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees' (7 May 2002) HCR/GIP/02/02, paras 1-4.

<sup>4</sup> Derek McGhee, 'Persecution and Social Group Status: Homosexual Refugees in the 1990s' (2001) 14(1) *Journal of Refugee Studies* 20, 29.

<sup>5</sup> Sabine Jansen and Thomas P. Spijkerboer, 'Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe' (*COC Nederland/VU University Amsterdam*, 2011).

<sup>6</sup> 'Freedom of Information (FOI) Request 27021', Home Office, Families and Gender Team (9 December 2013) 4.

<sup>7</sup> Home Office, 'Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim' (February 2015)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/404372/EXT\\_Asylum\\_Instruction\\_Sexual\\_Identity\\_Issues\\_in\\_the\\_Asylum\\_claim\\_v5\\_20150211.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/404372/EXT_Asylum_Instruction_Sexual_Identity_Issues_in_the_Asylum_claim_v5_20150211.pdf)> accessed 14 April 2015.

<sup>8</sup> *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31.

<sup>9</sup> *ibid* [7-8] (Lord Hope).

for them to conceal their identity to avoid persecution.<sup>10</sup> Prior to the UKSC's decision in *HJ (Iran)*, it had been estimated that 56% of sexual identity claims were refused on this basis.<sup>11</sup> The Court stated that if the fear of persecution was a 'material reason' for concealing one's sexual identity, the claimant deserved protection.<sup>12</sup> By stating that 'discreet' behaviour in avoidance of persecution was itself persecutory, the UKSC was praised for dismantling a prejudicial aspect of the UK system for LGB refugees.<sup>13</sup> Whilst a shift has taken place within LGB decision-making since the *HJ (Iran)* decision, barriers remain for LGB asylum-seekers. These are encapsulated by allegations that a 'culture of disbelief' pervades the process and processors of sexual identity-based asylum claims.<sup>14</sup>

The current UK regime for determining sexual identity-based asylum claims is highly conflicted. On the one hand, there is the broader, embittered dialogue on immigration, reflecting the economic anxieties of the European populace that immigration, including asylum, is an economic drain on the receiving countries.<sup>15</sup> On the other hand, LGB claimants, NGOs working with such claimants, and legal representatives have voiced their dissatisfaction with the UK asylum process, describing the unreasonable standards to which such cases are held.<sup>16</sup> Claiming a disproportionately high refusal rate in LGB claims, critics have argued that the insurmountable standards applied to such cases reflect the last bastions of homophobia lingering within the asylum system.<sup>17</sup>

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<sup>10</sup> *ibid* [29] (Lord Hope).

<sup>11</sup> UKLGIG, "Missing the Mark" - Decision Making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims' (14 October 2013) 4.

<sup>12</sup> *HJ (Iran)* (n 8) [62] (Lord Rodger).

<sup>13</sup> S. Chelvan, 'Put Your Hands up (If You Feel Love)' (2010) JCWI Bulletin 56, 57.

<sup>14</sup> UKLGIG, "Missing the Mark" (n 11) 4.

<sup>15</sup> Migration Watch, 'The Economics of Large Scale Immigration' Briefing Paper (July 2014) <[http://www.migrationwatchuk.org/pdfs/BP1\\_34.pdf](http://www.migrationwatchuk.org/pdfs/BP1_34.pdf)> accessed 13 June 2015.

<sup>16</sup> Nathaniel Miles, 'No Going Back: Lesbian and Gay People in the Asylum System' (*Stonewall*, 2010); UKLGIG, "Failing the Grade" - Home Office Initial Decisions on Lesbian and Gay Asylum Claims' (8 April 2010).

<sup>17</sup> Owen Bowcott, 'Gay Asylum Seekers Feeling Increased Pressure to Prove Sexuality, Say Experts' *The Guardian* (3 February 2013) <<http://www.theguardian.com/uk/2013/feb/03/gay-asylum-seekers-pressure-prove-sexuality>> accessed 14 April 2015.

The former Immigration Minister, Damian Greene admitted in May 2011, that the Home Office was not collecting data on the asylum claims made in the UK on sexual identity grounds, despite the government's commitment to protect from deportation LGBT asylum-seekers at risk of persecution.<sup>18</sup> He, nevertheless, vowed to do so in the future. In the face of a clear admission that claims based on sexual identity are not being monitored, however, it becomes clear that independent research is required to make up for this absence.

### 3. Research Questions

The main research question of this thesis is: to what extent does the British asylum system determine the sexual identity-based asylum claims of LGB individuals fairly? This central question breaks down into the following sub-questions: 1. Is fairness the correct standard for examining the decision-making in sexual identity-based asylum claims? 2. What is a fair asylum system? 3. Has the UKSC decision in *HJ (Iran)* resulted in the fair determination of LGB asylum claims? 4. Is the British asylum system sensitive towards the complex and diverse experiences of LGB asylum-seekers, relating to identities that are similarly disposed? 5. If so, how is this reflected in the substantive decision-making?

This research begins with the hypothesis that the British asylum system is failing to treat the claims of LGB asylum-seekers with the fairness required. The right to seek asylum is a fundamental human right.<sup>19</sup> As a signatory to the Refugee Convention, the UK unreservedly agreed to protect the rights of refugees and to properly consider the claims of asylum-seekers within the spirit, purpose and principles of the Refugee Convention. Accordingly, clear and sustained public (UK and international) perceptions that the UK may not be acting within the spirit, purpose and principles of the Refugee Convention should be a cause for concern for claimants, the UK public

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<sup>18</sup> Karen McVeigh, 'Gay Asylum Claims Not Being Counted Despite Pledge, Admit Ministers' *The Guardian* (1 May 2011) < <http://www.theguardian.com/uk/2011/may/01/gay-asylum-claims-not-being-counted> > accessed 14 April 2015.

<sup>19</sup> UN General Assembly, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 14.

and the international community. These concerns will be thoroughly examined in the light of the concept of fairness proposed in the thesis. Therefore, an essential part of this research is to elucidate and propose an appropriate understanding of fairness in the context of LGB asylum claims.

The first part of the thesis will explore the value of fairness to the evaluation of the UK asylum system, where fundamental rights are at stake. This analysis will then be used to examine what a fair asylum system would look like, through the development of a set of ‘structural principles’. These indicate the key components of a fair asylum system. This aim is addressed in Chapter two of this thesis.

The second part will investigate and scrutinise the process of determining sexual identity-based asylum claims within the British asylum system in the post-*HJ (Iran)* climate, with reference to the appropriate legal and evidentiary standards. As the UKSC’s decision in *HJ (Iran)* was lauded for improving the standards of LGB determinations, this thesis analyses its impact on actual decision-making. Thus, this thesis situates the research in a specific timeframe, focusing on examining LGB claims lodged or decided from 2010 onwards. This thesis will use the ‘structural principles’ advanced in Chapter two as an analytical framework to assess the fairness of the British asylum system. Issues of non-compatibility with the principles will be assessed to identify where the problems (if any) lie in the determination of LGB asylum claims.

Through an empirical research component, this thesis relies upon, and significantly expands, the existing work in the field of sexual identity-based asylum claims (which is referred to through the analysis in Chapters three and four). Whilst empirical research on the asylum experiences of LGB individuals is not new, existing in the sociological/anthropological domain, subjecting such empirical data to a legal analysis is academically significant.

## 4. Terminology

One must introduce and define the terms utilised throughout this thesis.

A distinction must first be made between the terms ‘refugee’ and ‘asylum-seeker’. Article 1(A) of the Refugee Convention defines a refugee as someone who ‘owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country’. In this thesis, the term ‘refugee’ describes a claimant granted protection by the country where asylum has been sought. Distinctly, the term ‘asylum-seeker’ describes someone who seeks refugee status, but whose claim is not yet definitively evaluated.<sup>20</sup>

The terms ‘lesbian’ and ‘gay’ refer to emotional, romantic and/or sexual same-sex attraction, that is, women who are primarily attracted to other women and men who are primarily attracted to men.<sup>21</sup> Similarly, the term ‘bisexual’ refers to those individuals who are attracted to both men and women. Together, these terms encompass three aspects or components of ‘sexual orientation’, i.e., one’s sexual, romantic and/or physical attraction and behaviour. Aside from being heterosexual/straight, homosexual/gay or lesbian, or bisexual, other categories of sexual orientation exist. For the sake of simplicity and clarity, this thesis solely and specifically refers to lesbian, gay or bisexual as minority categories of sexual orientation – minority for the fact that they are non-heterosexual categories.<sup>22</sup> These categories provide the prism through which non-heterosexual asylum claims are evaluated. Thereupon, this thesis also uses the term ‘sexual minorities’ to refer to these three commonly recognised sexual orientations that exist in addition to the

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<sup>20</sup> UNHCR, ‘The Facts: Asylum in the UK’, <<http://www.unhcr.org.uk/about-us/the-uk-and-asylum.html>> accessed 10 April 2015.

<sup>21</sup> UNHCR, ‘Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees’ (23 October 2012) HCR/GIP/12/09, 4.

<sup>22</sup> International Commission of Jurists (ICJ), ‘Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity’ (March 2007) preamble.



dominant ‘heterosexual’ category. Finally, ‘sexual identity’ refers to an individual’s conception of themselves and the way that they choose to express this conception.<sup>23</sup> The term ‘sexual identity’ encompasses one’s sexual orientation, sexual behaviour and preferences, gender roles and other forms of expression relating to one’s membership of a particular identity community.<sup>24</sup>

Although sexual identity and sexual orientation are evidently terms covering different scopes of meaning, for the purposes of this thesis, they are used interchangeably. This is deliberate; the use of ‘sexual identity’ emphasises the complexity of the concept and its expansive definition, covering many aspects of one’s personal identity. It would appear logical to use the most inclusive term, namely, sexual identity, but this would ignore the research and dialogue in this area being foremost constructed around sexual orientation. Furthermore, not to trivialise the distinction, sexual orientation-based claims *are* sexual identity-based claims, orientation simply being one aspect of one’s identity. Moreover, these choices regarding the use of terminology acknowledge that claimants may not have constructed minority sexual identities beyond the recognition of their attraction to members of the same sex, or their non-identification with the dominant, heterosexual narrative.

Gender identity-based claims will not be explored in this thesis. Gender identity refers ‘to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body’ and other expressions of gender.<sup>25</sup> Gender identity is an important component of sexual identity.<sup>26</sup> For instance, the LGB community is more commonly referred to as the LGBT or LGBTI community, thus including transgender and intersex individuals. Despite this, the exclusion from this thesis of gender identity-based claims is a carefully considered decision. The issues relevant to a claim for asylum by transgender and intersex individuals can be unique and separate to those faced by individuals who identify as LGB. In attempting to cover both bases,

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<sup>23</sup> Michael G. Shivley and John P. De Cecco, ‘Components of Sexual Identity’ (1977) 3(1) *Journal of Homosexuality* 41-48, 41-42.

<sup>24</sup> *ibid.*

<sup>25</sup> ‘Yogyakarta Principles’ (n 22) preamble.

<sup>26</sup> Shivley and De Cecco (n 23) 41-42.

there was a danger that no issue would receive the depth of analysis deserved. Furthermore, although it is impossible to quantify the number of transgender and intersex claims made in the UK, feedback from stakeholders working in the field of sexual identity-based asylum explained that the numbers were low. Thereupon, accurately accessing and representing transgender and intersex claims through empirical research would be unreasonably difficult for a doctoral thesis.

## 5. Methodology

It is essential to provide an overview of the methodology employed in this thesis. Early on in the research process this author determined that a full investigation of the UK asylum system experienced by LGB asylum-seekers required a qualitative research approach. By combining both doctrinal and non-doctrinal legal analysis, the author could uncover the true impact of current UK asylum law and policy on the individuals claiming asylum on sexual identity grounds. By contrast, a non-empirical, solely doctrinal analysis would be too detached from the legal system in current operation. Consequently, the resulting approach to the research question prioritises qualitative and empirical methods to produce a current and accurate analysis that also foregrounds the experiences of LGB asylum-seekers.

Several approaches shape the research methodology adopted. This section first explains intersectionality and sexual diversity, the key concepts underpinning this thesis, before outlining the socio-legal nature of this thesis's approach. Subsequently, the methodology explains how doctrinal research, empirical research and the development of an appropriate theoretical framework each influenced the eventual execution of this research project.

### 5.1 The Key Concepts of Intersectionality and Sexual Diversity

Recognising that asylum claims can be made on the basis of one's sexual identity is part of a broader movement towards recognising, articulating and legislating on the rights of sexual minorities within all states. By way of example, same-sex sexual

activity was not legalised in parts of the UK until 1967,<sup>27</sup> 1969 in Canada, in 1994 across Australia, and not until 2003 across all of the US. Same-sex relationships have been legally recognised since 2001 in New Zealand, 2003 in Canada, in the UK from 2005 in the form of civil partnerships, and 2009 in Australia.<sup>28</sup> Same-sex marriage has been one of the remaining ‘frontier’ issues of LGBT equality.<sup>29</sup> For example, in the US, same-sex marriage was only federally recognised in the case of *Obergefell v. Hodges* in June 2015, after a particularly conflicted and protracted battle.<sup>30</sup>

With this perspective, one can understand that asylum is but one area of law that has been forced to understand minority sexual identities in order to confer upon LGB individuals their deserved rights. Thus, law and society must imbibe the reality that sexual attraction or orientation for LGB individuals is part of a more substantial sexual identity (as it is for heterosexuals). Additionally, identity construction can be a long-term process, especially for groups whose sexual or gender expressions are stigmatised and/or actively oppressed socially.

In the light of the wider struggles of LGB equality, this thesis promotes two key concepts to assist decision-makers and decision-facilitators with asylum claims made on grounds of sexual identity: intersectionality and sexual diversity. These concepts will be used as analytical tools throughout this thesis.

#### 5.1.1. *Intersectionality*

The first concept is that of intersectionality. Intersectionality is essential to areas where the law is forced to understand the realms of identity. It explains that the impact of discrimination or oppression cannot be understood through the lens of a single identity category. For the most pointed analysis of oppression and its consequences, one must recognise that our experiences are shaped by all the identity categories to which we affiliate. As a result, multiple lenses are required for use in

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<sup>27</sup> Same-sex sexual activity was decriminalised in England and Wales in 1967 by the Sexual Offences Act 1967, in Scotland in 1981 by the Criminal Justice (Scotland) Act 1980, and in Northern Ireland in 1982 by the Homosexual Offences (Northern Ireland) Order 1982.

<sup>28</sup> Jones Day, ‘Legal Recognition of Same-Sex Relationships’ <<http://www.samesexrelationshipguide.com>> accessed 10 April 2015.

<sup>29</sup> *ibid.*

<sup>30</sup> *Obergefell v. Hodges* 576 U.S. (2015).

one's analysis and decision-making.<sup>31</sup> For example, an incomplete analysis would result from failing to account for the way that sexual identity is shaped by categories such as, sex, gender, race, education, social class and/or age.<sup>32</sup>

Crenshaw first advanced the concept of intersectionality. She argued that it was flawed to treat as mutually exclusive dialogue on specific identity categories, such as race and gender.<sup>33</sup> Expanding upon the experiences of Black women in feminist discourse, Crenshaw contended that the experiences of Black women differed from White women. Similarly, when assessing oppression on grounds of race, the experiences of Black women differed from those of Black men. Thus, pursuing 'single-axis' analyses erased and denied legitimacy to the experiences of those holding affiliations according to multiple identity categories.<sup>34</sup> The lasting consequence was the characterisation of feminism or civil rights by those most privileged in the group, at the expense of those whose identities were more complex. This generated discrimination for these sub-groups along multiple lines. Therefore, Black women experience discrimination not just for being Black or female, but also for being Black women specifically.<sup>35</sup> Only by focusing on the oppression specific to this subgroup can an understanding of their experiences be developed. Otherwise, narratives that supposedly include the subgroup will serve to erase them and reinforce their oppression.<sup>36</sup>

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<sup>31</sup> Suzanne B. Goldberg, 'Intersectionality in Theory and Practice' in Emily Grabham et al., *Intersectionality and Beyond: Law, Power and the Politics of Location* (eds) (Routledge-Cavendish, 2009) 124.

<sup>32</sup> Danielle N. Shapiro, Desdamona Rios, and Abigail J. Stewart, 'Conceptualizing Lesbian Sexual Identity Development: Narrative Accounts of Socializing Structures and Individual Decisions and Actions' (2010) 20(4) *Feminism & Psychology* 491-510, 505; Layli Phillips and Marla R. Stewart, "'I Am Just So Glad You Are Alive': New Perspectives on Non-Traditional, Non-Conforming, and Transgressive Expressions of Gender, Sexuality, and Race Among African Americans' (2008) 12(4) *Journal of African-American Studies* 378-400, 379.

<sup>33</sup> Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) *U. Chi. Legal F.* 139, 139-40.

<sup>34</sup> *ibid.*

<sup>35</sup> *ibid.*

<sup>36</sup> Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color' (1991) *Stanford Law Review* 1241-99, 1244.

Examining the oppression of Black women highlights that all identities are intersectional; we can be affected uniquely by the multiple identity categories with which we affiliate ourselves. This is also true for LGB individuals. Although they are categorised by their sexuality for the purposes of the asylum examination, sexual identity is shaped by more than sexual attraction. Single-axis analyses do not competently explain the behaviour or experiences of asylum-seekers at the country of origin or in the UK. Asylum-seekers are marked by their diversity. People seek refuge in the UK from nations across the globe; they speak different languages and come from different cultures. Many will adhere to a particular set of religious beliefs, or none at all. Their lives will have been shaped by their education (or lack thereof), and their economic circumstances. They may have been members of ethnic minorities in their home societies, or they may have held political views that went with or against the majority of their fellow citizens. Although one aspect of their identity formulates the basis of their claim, we cannot disregard the fact that an intersectional approach, based on recognising the multiple affiliations that a person holds, can help decision-makers to understand persecutory experiences and lives of LGB asylum-seekers. The consequence of improved understanding is the improved quality of decision-making.

Intersectionality has been criticised by poststructuralists for encouraging the indefinite ‘mitosis’ of identity categories, and essentialising identity categories in an identical fashion to single-axis frameworks.<sup>37</sup> Ehrenreich has described this as the ‘infinite regress problem’.<sup>38</sup> The ‘infinite regress problem’ undermines the idea of plural analyses when the endless creation of sub-groups results in the ‘individual’ existing as the only coherent category. Such poststructuralist critique does not apply to this thesis’s application of intersectionality, which focuses on the convergence of identities, not their difference or divergence.<sup>39</sup> In other words, intersectionality is used in this thesis to highlight that the cross-section of identities can complicate experiences, not to identify sub-categories of LGB identities. Furthermore, as Collins

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<sup>37</sup> James J. Dean, ‘Thinking Intersectionality: Sexualities and the Politics of Multiple Identities’ in Yvette Taylor, Sally Hines, Mark E. Casey (eds), *Theorizing Intersectionality and Sexuality* (Palgrave Macmillan, 2011) 119.

<sup>38</sup> Nancy Ehrenreich, ‘Subordination and Symbiosis: Mechanisms of Mutual Support between Subordinating Systems’ (2002) 71 UMKC L. Rev. 251, 272.

<sup>39</sup> Goldberg (n 31) 126.

explains, intersectionality does not mandate an additive approach, nor does it command the privileged treatment of a certain category of oppressed individuals over another.<sup>40</sup> Thus, intersectionality is used in this thesis to examine the points of contact between the various aspects of oppression.

Likewise, ensuring that the approach to determining LGB asylum claims is intersectional does not involve arguing for privileged treatment for this particular minority. Sexual identity is the focus of this particular analysis, but it is not a platform to command better treatment above other applicants. As Crenshaw cautions, the concept of intersectionality is not innovative; it is not ‘being offered as some new totalizing theory of identity’.<sup>41</sup> In fact, the use of intersectionality can and should be utilised within all asylum claims to magnify the junctures of identity and experiences of oppression. This would inject the system with greater fairness overall (Chapter two).

Intersectionality theory already applies within the field of asylum. For example, the UNHCR Handbook on determining refugee claims emphasises that ‘it is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them’.<sup>42</sup> Additionally, it is natural for the different grounds of claim to overlap in the persecutory narratives of many claimants.<sup>43</sup> This was exemplified by Macklin, who posed the example of an ‘Asian woman who has a well-founded fear of persecution in Africa’.<sup>44</sup> She pointed out that the woman could rely upon the grounds of race and sex as causal reasons for her fear of persecution. That refugee law recognises the ability to claim asylum on multiple grounds is an important expression of the intersectionality concept and a great basis for expanding its role within the refugee status determination (RSD). By introducing the concept

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<sup>40</sup> Patricia Hills Collins, *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empire* (Routledge, 1990) 207.

<sup>41</sup> Crenshaw, ‘Mapping the Margins’ (n 36) 1244.

<sup>42</sup> UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (December 2011) HCR/1P/4/ENG/REV.3, paras 66-67.

<sup>43</sup> *ibid.*

<sup>44</sup> Audrey Macklin, ‘Refugee Women and the Imperative of Categories’ (1995) 17(2) Human Rights Quarterly 213-77, 263.

into the area of sexual identity-based asylum claims with focus and direction, it will empower claimants to present their narratives in their full richness and density. Additionally, it will encourage decision-makers to understand the varying strands of one's identity (and the way in which they inform one another). This will improve sensitivity to the unique positions that LGB claimants often hold in their countries of origin and to their distinctive experiences of persecution.

By underscoring the need for flexibility at all stages and allowing claimants to construct identities (and their experiences of oppression) as they wish (insofar as it may be appropriate), this approach avoids essentialism. The use of intersectionality, nonetheless, requires monitoring to ensure that decision-makers do not use intersectionality as a 'formula' to build new categories upon which newer stereotypes could be attached. In this thesis, intersectionality is used to improve the way that decision-makers can understand human behaviours and interactions. The purpose of the concept is to ensure that even the most marginalised members of the LGB asylum-seeking community receive access to the same quality of decision-making as their more privileged counterparts. This line of reasoning is critical to the second analytical tool of this thesis.

### *5.1.2. The Diversity of Sexual Identity*

From intersectionality, one must extract and expand upon a theme that forms the second key concept of this thesis: the complexity and diversity of sexual identity. This illustrates the idea that both the processes of constructing one's sexual identity, and the identities themselves, are diverse and complex (and often incomplete or ongoing). Sexuality is such an intricate matter that no definitive explanation of sexual identity development has been agreed upon.<sup>45</sup> It can be impossible to disentangle an identity whose creation has been reliant on so many additional factors, including environments of stigma or outright intolerance.

It is clear that legal systems have struggled with the rights of sexual minorities because policy-makers and decision-makers have been unable to grasp these

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<sup>45</sup> Michele J. Eliason, 'Identity Formation for Lesbian, Bisexual, and Gay Persons: Beyond a "Minoritizing" View' (1996) 30(3) *Journal of Homosexuality* 31, 31-32; Shapiro et al. (n 32) 492-493.

fundamental characteristics of sexual identity. Instead of accepting the diversity of sexual identity, legal systems have sought to deny, reduce or essentialise. Therefore, policy-makers and decision-makers have made decisions failing to endorse the absolute equality of LGB people, which are being readdressed.<sup>46</sup> Consequently, before any decision on sexual identity-based asylum is made, the evaluation must begin from the position that sexuality is complex, changeable and diverse. This is a result of the diversity of an individual's personality, background and experience, and the presumed variations in identity construction.

Thus, RSDs must first tackle the recognition and endorsement of sexual diversity. For the process of granting protection to genuine claimants to be fair, asylum decision-making must disavow, explicitly, the possibility of decisions essentialising, stereotyping or constraining LGB people. The asylum system has struggled with understanding sexual identity in the past. If the British asylum system is to achieve, as closely as possible, the ideal of fairness, it must do so by entrenching this concept into all corners of the system. Accordingly, sexual diversity should have both procedural and substantive impact.

Moreover, it is in the interests of the asylum system to adopt a meaningful position on sexual diversity and to be sensitive to the needs of LGB asylum-seekers. First, it would have a profound impact upon the quality of decision-making and public (and applicant) confidence in the system. Secondly, there is a clear economic argument in favour of improved decision-making: it results in fewer appeals, fewer fresh claims, and fewer applicants receiving financial support for prolonged periods of time whilst their claims are processed. The validation of sexual diversity would also provide a space of existence (and capacity for protection) for the claimant whose identity is in flux, or cannot be concisely articulated. It follows that at all points in the system, flexibility must also characterise sexual diversity analysis. Sexual diversity is a means of facilitating the accurate determination of LGB asylum claims. If it is used to bind and deny, the system will have misappropriated it.

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<sup>46</sup> By way of example, in the British context, LGB individuals gained the right to serve openly in the military in 2000 as a result of the case, *Smith and Grady v. UK* (1999) 29 EHRR 493; same-sex couples obtained the right to adopt through the Adoption and Children Act 2002; and the Employment Equality (Sexual Orientation) Regulations 2003 provided protection from discrimination on grounds of sexual orientation.



The key concepts of intersectionality and sexual diversity are the philosophical bedrock of the ‘structural principles’ and the subsequent appraisal of the British asylum system. These concepts, if need be, can be broken down to the simplest precept – the asylum system can only be fair if it is flexible enough to include and protect those whose lives do not come within the confines of the dominant, master narrative.

## **5.2 Developing the appropriate methodology: a socio-legal approach**

This research is a socio-legal work. Wheeler and Thomas explained that the word ‘socio’ in social-legal studies refers to ‘an interface with a context within which law exists, be that a sociological, historical, economic or geographic, or other context’.<sup>47</sup> Socio-legal studies have also been defined by the Economic and Social Research Council as ‘an approach to the study of law and processes’ which ‘...covers the theoretical and empirical analysis of the law as a social phenomenon’.<sup>48</sup> The research’s socio-legal focus is informed by a desire to examine the experience of UK refugee law as lived (intersectionally) by LGB asylum-seekers. The asylum system plays a vital social function: it confers legal status and, thereby, protection to individuals seeking safety from persecution, and offers them the opportunity to rebuild their lives. Without examining this system as a ‘social phenomenon’, we cannot gain the necessary insight on the fairness of the legal process for sexual minority claimants.

The desire to foreground the experiences of LGB asylum-seekers also inspired the socio-legal approach. This is underpinned by feminist theory, namely that research must avoid silencing the voices of women and turning them into the objects of research, rather than the subjects.<sup>49</sup> In this instance, the researcher has been particularly conscious of not turning LGB asylum-seekers into the passive participants of this study, upon whose experiences meaning is imposed.

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<sup>47</sup> Sally Wheeler and Phil Thomas, ‘Socio-Legal Studies’ in David Hayton (ed), *Law's Futures* (Hart Publishing, 2010) 271.

<sup>48</sup> Economic and Social Research Council, ‘Review of Socio-Legal Studies: Final Report’ (ESRC, 1994) 1.

<sup>49</sup> David E. Gray, *Doing Research in the Real World* (3rd edn, Sage, 2013) 167.

Consequently, the desire to inject the voices, in the most active sense, of LGB refugees into this thesis, necessitated a non-traditional methodological approach to a legal thesis. One hopes that adopting these research strategies reduces the distance between the researcher and the ‘LGB asylum experience’, and produces an original contribution to the field of sexual identity-based asylum.

### 5.2.1. *Doctrinal Research as the Preliminary Research Stage*

Doctrinal research was the necessary first step towards examining the British asylum system. Doctrinal research is defined as that ‘which asks what the law is in a particular area’.<sup>50</sup> Traditionally, the researcher used it to describe the existence of the body of law and its application.<sup>51</sup> Williams argued that there are two forms of legal research, which this thesis has combined when pursuing doctrinal research. First, there is ‘the task of ascertaining the precise state of the law on a particular point’, and secondly, there is ‘the sort of work undertaken by lawyers...who wish to explore at greater length some implications of the state of the law’.<sup>52</sup>

In the case of LGB asylum, the wealth of material available on the practice of UK asylum decision-makers meant that doctrinal research could be more rewarding than merely outlining the law. Doctrinal research could provide a preliminary evaluation of the current asylum policy, an assessment of the problems within this area, and guidance regarding potential reforms.<sup>53</sup> Indeed, doctrinal research as a first step engendered a clear grasp of the asylum procedure in the UK and the practical stages through which an asylum claim may proceed. It also facilitated an understanding of the competing tensions affecting the delivery of the RSD and the specific issues relating to claims made on sexual identity grounds.

### 5.2.2. *Empirical Research as the Secondary Research Stage*

A solely doctrinal focus was insufficient to examine the complexities of everyday asylum decision-making. Specifically, it could not represent the voices of sexual

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<sup>50</sup> Ian Dobinson and Francis Johns, ‘Qualitative Legal Research’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 18.

<sup>51</sup> *ibid* 19.

<sup>52</sup> ATH Smith, *Glanville Williams: Learning the Law* (14th edn, Sweet & Maxwell, 2002) 206.

<sup>53</sup> Dobinson and Johns (n 50) 20.

minority asylum-seekers or situate the evaluation of the British asylum system in the post-*HJ (Iran)* climate. Consequently, an empirical research component to the project was developed, which would enable the direct appraisal of the asylum system from 2010 onwards. Semi-structured interviews were utilised as they allowed interviewees to build a narrative of experience and enabled the researcher to explore how varying aspects or stages of the asylum system affected particular individuals.<sup>54</sup> The empirical research consisted of interviews with 10 professionals (academics, solicitors, barristers, and NGO employees working on support and advocacy); 20 LGB asylum-seekers (10 men and 10 women from a variety of regions); and one former Home Office decision-maker. As the researcher could not obtain interviews with current Home Office personnel, two Freedom of Information (FOI) requests were addressed to the Home Office, posing questions that would have been raised in potential interviews. A request to interview members of the Judiciary was unsuccessful. The interview transcripts were analysed thematically to focus on the particular experiences of the interviewees within the framework of the decision-making process. This qualitative analysis allowed the researcher to test the standards experienced by the interviewees within the British asylum system. This produced a better appraisal of the British asylum system and assisted with determining whether the decision in *HJ (Iran)* resulted in fairer decision-making. This combined doctrinal and empirical approach thus produced a more holistic analysis of the British asylum system.

Hutchinson describes the first step of empirical work as checking that the doctrine, when properly interpreted, is being correctly followed. This, he believes, would establish whether the problems ‘are a result of poor doctrine or lack of compliance with the doctrine’.<sup>55</sup> Accordingly, examining the impact of current policy on determining LGB claims is critical to this evaluation. Through doctrinal research as a first step, the researcher assessed, in summary, the policies and doctrines affecting this area. This enabled a better understanding of the current asylum doctrine within the UK and the policies that underpin it. It also assisted in identifying the ‘correct’ doctrine for the asylum system to protect genuine LGB asylum-seekers. The

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<sup>54</sup> Max Travers, *Qualitative Research through Case Studies* (Sage, 2001) 2.

<sup>55</sup> Terry Hutchinson, ‘Doctrinal Research’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge, 2013) 8.

subsequent steps of the investigation within this thesis, including the construction of an analytical framework (Chapter two) were, thereby, wholly dependent upon the doctrinal research process.

Finally, there remained one final concern. The researcher was conscious of the contentious nature of migration in the UK, its impact upon UK migration policy, and the public attention that the area of sexual identity-based asylum has received. Consequently, a strategy was necessary to distinguish and separate the research from the issues raised in the media. This would prevent the substantive evaluation of the British asylum system from being dismissed on grounds of partiality or pandering to a media narrative. The appropriate strategy was to begin the evaluation from an objective and legally reasoned platform. This ‘legal platform’ developed into an integral strategy of the thesis: a theoretical framework.

### *5.2.3. Developing an Appropriate Theoretical Framework as the Tertiary Research Stage*

This thesis developed a theoretical framework (‘structural principles’, elaborated in Chapter two) to ensure that the analysis did not replicate dominant media narratives. The principles identify the essential characteristics of a fair asylum system for LGB asylum-seekers. The framework articulates the values of this research and provides continuity of these themes, from theoretical to analytical chapters. It also ensures that the appraisal is independent and balanced, given the highly charged hypothesis. Moreover, it provides the tools to replicate the investigation for other Convention grounds.

The importance of the structural principles is reinforced by the philosophical arguments underpinning fairness. In fact, the structural principles act as the core expression of the fairness concept, extrapolated from UK administrative and international human rights law, and supranational treaties (see Appendix B). The principles seek to avoid essentialising the behaviour or needs of LGB asylum-seekers. They are underpinned by the key concepts of intersectionality and sexual diversity, which aim to accommodate the complexity of human behaviour. A theoretical framework constituted by the ‘structural principles’ allows this thesis to simultaneously identify the characteristics of a fair asylum system for LGB refugees

(and indeed, asylum-seekers lodging protection claims on other grounds), and to use the framework to test the British asylum system for its compatibility, and therefore, its inherent fairness. Thus, the framework provides the final essential component for successful completion of this research.

### **5.3 Rooting the Methodology in Evaluation Theories**

The methodology of this thesis is grounded in evaluation theory. Although the theory has not been conclusively defined, it is understood as a process of information gathering. This information is used to make decisions about the appropriateness of the programme or procedure assessed and whether an alternative approach would be preferable.<sup>56</sup>

Evaluation theory supposes that the approach to an assessment is entrenched in the evaluator's values.<sup>57</sup> Values have an intrinsic, irremovable place within the act of evaluation, as 'wholly disinterested knowledge claims are unattainable'.<sup>58</sup> Values need not impair one's evaluation, providing the evaluator is self-aware and honest about the values held and how they will affect the assessment.<sup>59</sup> Evaluation theory, therefore, informs the methodological approach to this thesis. The research advocates explicitly the values by which the standards of an asylum system ought to be based and assessed, namely, the values of fairness, equality and social justice. It also provides decision-makers of the British asylum system with a clear and objective evaluation of the system.

The ability for an evaluation to advocate a set of values is useful, powerful even. If those values are held in high esteem by the society one's research seeks to address, the dissemination of the research can have greater significance and impact.<sup>60</sup>

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<sup>56</sup> Marvin C. Alkin, 'Evaluation Theory Development' (October 1969) 2(1) Evaluation Comment 2, 2-7.

<sup>57</sup> Jennifer C. Greene, 'Evaluation, Democracy, and Social Change' in Ian F. Shaw, Jennifer C. Greene and Melvin M. Mark (eds), *The Sage Handbook of Evaluation* (Sage, 2006) 118.

<sup>58</sup> Jennifer C. Greene, 'Participatory Evaluation' in Linda Mabry (ed), *Evaluation and the Postmodern Dilemma. Advances in Program Evaluation* (Vol 3, JAI Press, 1997) 27.

<sup>59</sup> Michele Tarsilla, 'Theorists' Theories of Evaluation: A Conversation with Jennifer Greene' (2009) 6 (13) Journal of MultiDisciplinary Evaluation 209-19, 211.

<sup>60</sup> Thomas A. Schwandt, 'Evaluation as Practical Hermeneutics' (1997) 3(1) Evaluation 69-83, 78.

Consequently, many evaluators encourage the explicit articulation of the values motivating the evaluation, particularly if they engage concepts that are ‘revered’ by society, such as fairness, equality and democracy, for example. Thus, in espousing values arguably important within British society that form common touchstones of the UK legal system the researcher hopes that the research results will have a greater impact on the system upon which it comments. Finally, as evaluation is a political act, with the ability to influence relationships of power, this thesis also acknowledges and engages with the broader political dimensions of asylum and migration.<sup>61</sup>

This thesis is rooted in the tradition of democratic evaluation: because the priority value is the public interest, the evaluation results must be accessible to non-specialist audiences.<sup>62</sup> In particular, this research is inspired by the sub-tradition of ‘Deliberative Democratic Evaluation’, which seeks to address inequalities affecting various minorities and pursue the advancement of social justice.<sup>63</sup> House and Howe argue that the evaluative model utilised must ensure that the interests of all stakeholders are included, particularly those most marginalised. Similarly, this thesis includes the perspectives of all stakeholders in the asylum procedure, whilst ensuring the prominence of the traditionally ‘voiceless’, namely, sexual minority asylum-seekers. Moreover, the proponents of ‘Deliberative Democratic Evaluation’, House and Howe, espouse values shared by this researcher. Both draw upon Rawls’ theories concerning social justice, comprising of the equal ‘distribution’ of status, voice and participation to stakeholders.<sup>64</sup> This thesis cites Rawls in Chapter two to explain its use of ‘fairness’ as the primary value and standard of this evaluation. Despite advancing imperative strategic values, this thesis remains objective, reaching its conclusions through deliberation and reasoned argumentation.<sup>65</sup>

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<sup>61</sup> Greene, ‘Evaluation, Democracy and Social Change’ (n 57) 119.

<sup>62</sup> Barry MacDonald, ‘Evaluation and Democracy’ (1978) Public address at the University of Alberta Faculty of Education, Edmonton, Canada, 50.

<sup>63</sup> Ernest R. House and Kenneth R. Howe, *Values in Evaluation and Social Research* (Sage, 1999) 97.

<sup>64</sup> John Rawls, *A Theory of Justice* (OUP, 1999).

<sup>65</sup> House and Howe (n 63) 109.

This research is also influenced by the sub-tradition of ‘Critical Evaluation’, which focuses evaluation around societal critique.<sup>66</sup> It aims to reveal the ‘structural injustices’ within the programme being evaluated, ‘deconstructing inequitable distributions of power and reconstructing them more fairly and justly’.<sup>67</sup> This echoes a goal of this research, which can be summarised as revealing the injustice (if any) of the British asylum system towards LGB asylum-seekers and articulating the characteristics of a fairer alternative.

Critical evaluation is also useful because it appreciates that the layers of context are important in understanding the impact of a programme (or, in our case, a legal field). Everitt describes critical evaluators seeing practice as ‘constructed within legislative, policy, and funding processes... shaped through dimensions of class, gender, race, age, sexuality and disability.’<sup>68</sup> Thus, critical evaluation informs the necessity of understanding the asylum narratives (belonging to the individual and the system) as subject to multiple considerations. Accordingly, critical evaluation has endorsed a key concept of this research, intersectionality (section 5 above). This principle enables this research to take a critically evaluative approach to the British asylum system.

#### **5.4 Foregrounding the Thesis Investigation with Quantitative Data**

Before the subsequent investigation of the analytical chapters is carried out, one can ground the research in existing quantitative knowledge of sexual identity-based asylum. Despite promising to collate statistics on LGB asylum claims in May 2011,<sup>69</sup> the Home Office’s response regarding its collection and release of data in this area has been contradictory and confusing. Responding to the researcher’s initial FOI request for this thesis, the Home Office claimed to be ‘recording asylum applicants who had included their sexual orientation as part of their asylum claims in 2007’.<sup>70</sup> It also assured the researcher that it would release its data at the end of 2013. In a follow-up request, however, the Home Office stated that the data collection system

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<sup>66</sup> Greene, ‘Evaluation, Democracy and Social Change’ (n 57) 129.

<sup>67</sup> *ibid* 130.

<sup>68</sup> Angela Everitt, ‘Developing Critical Evaluation’ (1996) 2(2) *Evaluation* 173-88, 174.

<sup>69</sup> McVeigh (n 18).

<sup>70</sup> ‘FOI Request 27021’ (n 6) 4.

was still a ‘work-in-progress’ and the data requested was not available. Contradictorily, it also stated that ‘the required information would only be recorded in the case notes sections within the Home Office database or held solely on the paper files’ and for this reason, the requested data was too expensive to produce. This is confusing and suggests that a system for collecting data has not been developed at all.<sup>71</sup> Why the Home Office has not developed an electronic database to monitor the treatment of individual grounds of claim is unclear and inadequate.

Periodically, the Home Office releases general statistics (unspecific to LGB asylum claims) regarding the climate of migration within the UK. These are useful in elucidating the landscape in which the subsequent examination and fieldwork has taken place. Thus, in the year ending March 2014, 23,803 asylum applications were made in the UK on all grounds, of which 64% of initial decisions were refused.<sup>72</sup> In the year ending March 2015, 25,020 claims were lodged in the UK overall, of which 60% of initial decisions were refused.<sup>73</sup>

According to the response to the Freedom of Information request, 19,953 asylum claims were made in 2011, and 21,958 in 2012.<sup>74</sup> The rate of refusal in asylum claims was 59% in 2011 and 56% in 2012.<sup>75</sup> Of the rejected claims, 2,216 were allowed at the appeal stage in 2011, and 1,829 in 2012.<sup>76</sup> Moreover, of the claims made in these years, 779 in 2011 and 548 in 2012 led to an application for judicial review of the decision to refuse the asylum claim.<sup>77</sup>

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<sup>71</sup> ‘Freedom of Information (FOI) Request 31669’, Home Office, Gender and Sexual Orientation Team (13 June 2014) 2.

<sup>72</sup> UK Visas and Immigration, ‘Immigration Statistics, January to March 2015’ <<https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2015/immigration-statistics-january-to-march-2015#asylum-1>> accessed 22 July 2015.

<sup>73</sup> *ibid.*

<sup>74</sup> ‘FOI Request 27021’ (n 6) 2.

<sup>75</sup> In 2011, 59% represents the refusal of 11,731 claims out of a total 19,865 made that year. However, only 17,380 initial decisions were made. On this basis, the refusal rate would be 67%. Similarly, if counted in an identical fashion, the refusal rate on initial decisions made in 2012 would stand at 64%. For the full figures, see UK Visas And Immigration, ‘Asylum Data Tables Immigration Statistics July to September 2014, Volume 1’ <<https://www.gov.uk/government/statistics/immigration-statistics-july-to-september-2014-data-tables>> accessed 14 April 2015.

<sup>76</sup> ‘FOI Request 27021’ (n 6) 3.

<sup>77</sup> *ibid.*



Other statistics suggest that between 2,000 and 3,000 individuals are held in immigration detention in the UK at any given time.<sup>78</sup> In 2012, 48% of the immigration detainee population consisted of individuals who had sought asylum.<sup>79</sup>

In the sexual identity context, there are a number of independent statistics, which premise this research. The research of the UK Lesbian and Gay Immigration Group (UKLGIG), released in April 2010 (prior to the *HJ-Iran* decision) surveyed the asylum claims of LGB individuals that accessed their services between 2005 and 2009. This amounted to 50 Reasons for Refusal letters of claimants from 19 different countries. The research found that, compared with an average (overall) refusal rate of 73% in 2009, the refusal of LGB claims stood at 98-99%.<sup>80</sup> In 56% of the claims assessed, Home Office decision-makers asserted that individuals could return to their countries of origin safely, providing they acted ‘discreetly’.<sup>81</sup>

An average refusal rate of asylum claims of 73% in 2009 and 74% in 2010,<sup>82</sup> compared with 2011 and 2012 (59% and 56% respectively), may suggest some change in the decision-making process, or in the quality of decision-making between 2010 and 2011, although these statistics alone cannot provide an absolute understanding. Nonetheless, in lieu of data from the Home Office on sexual identity-based asylum claims, these statistics help to create the background for this research investigation.

### 5.5 The Empirical Research

The empirical research component of this thesis studies the experiences of LGB asylum-seekers under the British asylum system from the perspective of multiple stakeholder categories (explained below). It is evaluative in nature, contending that

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<sup>78</sup> Stephanie J. Silverman and Ruchie Hajela, ‘Immigration Detention in the UK’ (*The Migration Observatory at the University of Oxford*, 6 February 2015) 2.

<sup>79</sup> *ibid.*

<sup>80</sup> UKLGIG, “Failing the Grade” (n 16) 2.

<sup>81</sup> *ibid.* 4.

<sup>82</sup> Home Office, ‘Control of Immigration: Quarterly Statistic Summary, United Kingdom, Quarter 4 2010’ <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/116074/control-immigration-q4-2010.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116074/control-immigration-q4-2010.pdf)> accessed 14 April 2015.

this approach provides a detailed and incisive study into the practical operation of the UK system for LGB claimants.<sup>83</sup>

Empirical research is a powerful tool of assessment, particularly when gauging the efficacy of the law upon a category of society. As Bradney notes, ‘empirical research into legal processes.... provides information of a different character from that which can be obtained through other methods of research’.<sup>84</sup> When investigating certain legal issues, empirical research is indispensable, and even necessary. Researchers such as Gilbert, as well as Hammersley and Atkinson, also observe that empirical work provides the opportunity for one to test out research theory.<sup>85</sup> In fact, Hammersley and Atkinson encourage researchers to enter the process with a hypothesis, or an idea of the ‘foreshadowed problems’, whilst remaining open to the research results. It is unproblematic that this approach may later dictate a revision or abolition of the adopted hypothesis.

This thesis does not approach the fieldwork with a strict hypothesis. There is a general hypothesis that the current asylum system is unfair for LGB asylum-seekers, due to distinct problems with procedural and substantive aspects of the system (as Chapters three and four shall demonstrate). These preliminary beliefs can only be identified and extrapolated with greater perception by conducting the empirical work to test the current system against the analytical framework. For this reason, it would be inaccurate to describe the research as an entirely ethnographic study, an approach that tends to prefer an inductive approach to theory construction.<sup>86</sup> This project was embarked upon with a general idea about the quality of decision-making in the LGB asylum context and with some clarity regarding the principles that must govern the approach to such claims.

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<sup>83</sup> Dobinson and Johns (n 50) 32.

<sup>84</sup> Antony Bradney, ‘The Place of Empirical Legal Research in the Law School Curriculum’ in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 1031.

<sup>85</sup> Nigel Gilbert, ‘Research, Theory and Method’ in Nigel Gilbert (ed), *Researching Social Life* (3rd edn, Sage, 2008) 25.

<sup>86</sup> Anthony Bottoms, ‘The Relationship between Theory and Research in Criminology’ in Roy David King and Emma Wincup (eds), *Doing Research on Crime and Justice* (OUP, 2000) 30.

### 5.5.1. *The Empirical Research Design*

The empirical research was designed with attention to the requirements described by King and Epstein, and Fink. King and Epstein suggest the following four necessary components to successful empirical research: 1) identifying the population of interest, 2) collecting as much data as possible, 3) recording the process by which the data is observed, and 4) collecting the data in a way that avoids selection bias.<sup>87</sup> Furthermore, Fink argues that for successful legal research, the researcher must begin by establishing the objectives, and then fulfilling the following five requirements: 1) specific research questions, 2) a defined and justified sample, 3) valid data collection, 4) appropriate analytic methods, and 5) interpretations based on the data.<sup>88</sup> The initial components were identified from the outset, namely, that research would examine and evaluate the British asylum system for LGB asylum-seekers, leaving the mechanics of the research to be devised.

The researcher determined that semi-structured interviews with each stakeholder category, constructed around the asylum procedure itself, would provide the greatest yield of information. Many essential decisions regarding semi-structured interviews are made prior to, and during, the process of data collection, in terms of designing the questions.<sup>89</sup> This, however, does not reduce the freedom given to interviewees to describe their experiences as they recall them. In fact, by designing the data collection process around semi-structured interviews and the stages of the asylum process, a deliberate decision was made to empower interviewees with a framework to articulate their position on the fairness of the system. This would enable claimants themselves to assess the system according to their own memories and experiences. Furthermore, rather than harming or distorting the relationship between the interviewer and participant, semi-structured questioning struck the balance between empowering interviewees and maintaining an efficient process of data collection.<sup>90</sup>

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<sup>87</sup> Laura Epstein and Gary King, 'Empirical Research and the Goals of Legal Scholarship: The Rules of Inference' (2002) 69(1) *Chicago Law Review* 1, 99.

<sup>88</sup> Arlene Fink, *Conducting Research Literature Reviews: From the Internet to Paper* (2nd edn, Sage, 2005) 138.

<sup>89</sup> Roger Gomm, *Social Research Methodology: A Critical Introduction* (Palgrave Macmillan, 2008) 240.

<sup>90</sup> *ibid* 242.

This method of empirical research could be dismissed, as people generally assemble their experiences according to their understanding of what is important. Answers are shaped by what interviewees assume questioners expect of them, particularly in a research environment.<sup>91</sup> It does not follow, however, that such research should not be conducted at all. This tendency is the precise reason why such research is necessary. Without a greater repository of empirical data examining the experiences of real asylum-seekers, the fairness of the asylum system cannot be properly assessed.

At any rate, triangulation was an important part of the research design. This counteracted such critique, and ensured that the research was governed by the precepts of independence and objectivity. Triangulation is defined as the ‘cross-verification’ of data from multiple sources to provide a more ‘detailed and balanced’ picture in a given context.<sup>92</sup> Triangulation, particularly in a thesis that addresses a crucial aspect of the on-going political dialogue on migration, would advance the credibility of the resulting analysis and conclusions.<sup>93</sup> Although Gomm argues that triangulation raises the problem of what to do when sources disagree, assuming that there is a single ‘truth’ (which this thesis does not believe), this is not a relevant concern here.<sup>94</sup> The theoretical framework (Chapter two) provides us with a substantive understanding of how opposing perspectives should be reconciled within a fair asylum system. Practically, the research is not concerned with producing a single ‘truth’, but examining what is practically feasible regarding the quality of the asylum system to which prospective LGB asylum-seekers are entitled. This is a critical exercise that cannot be avoided, which involves balancing the perspectives and arguments of the different stakeholders.

Triangulation is an unusual approach to asylum research in the sexual identity-context, but can help make an original contribution to the existing knowledge. Here, triangulation is utilised to consider the perspectives of all the stakeholders invested in the British asylum system. Given the aforesaid contentious nature of immigration

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<sup>91</sup> *ibid.*

<sup>92</sup> Herbert Altrichter et al., *Teachers Investigate Their Work: An Introduction to Action Research across the Professions* (Routledge, 2013) 147.

<sup>93</sup> Gray (n 49) 198.

<sup>94</sup> Gomm (n 89) 243.

matters, this is important and valuable. Consequently, the researcher constructed the empirical work to consider the question of fairness from three perspectives: 1) professionals with notable experience in this particular area; 2) decision-makers; and 3) LGB asylum-seekers whose claims have been considered in the post-*HJ (Iran)* climate.

This translated into the goal of conducting interviews with three classes of participants: 1) professionals with experience in the field of sexual identity-based asylum, such as academics, solicitors, barristers and NGO workers; 2) decision-makers, consisting of Home Office caseworkers and judges at all levels of the British Judiciary; and, 3) individuals who claimed asylum on the basis of their sexual identities and had either been granted or refused asylum, or were awaiting a decision. One argues that triangulation in this format improved the quality of the research. It also ensured that the conclusions and recommendations produced are balanced and pragmatic, cognisant of the practical factors inhibiting the implementation of a better system. This is essential, as the research does not simply aim to produce an original contribution to this field, but has the specific goal of impacting the design and operation of the British asylum system for sexual minority claimants.

Deciding upon the appropriate sample sizes per category was a difficult process. There was an acknowledged tension between a greater sample size helping the research in its ‘representativeness’ of LGB asylum experiences, and ensuring that the research was completed within the set timeframe.<sup>95</sup> A variety of further considerations also dictated eventual sample sizes, e.g., time constraints, wanting to avoid information saturation, ensuring a balance between the doctrinal and empirical research, and the goals of triangulation. Sample size was set at 10 professionals, 10 decision-makers, and between 20 and 30 asylum-seekers.

The empirical research was designed around probability and non-probability quota sampling, selecting in the first category representatives who had developed a reputation for their work in the field of LGB asylum.<sup>96</sup> There are inherent limitations

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<sup>95</sup> Gray (n 49) 232.

<sup>96</sup> Stephen Gerard, *Research Design: Creating Robust Approaches for the Social Sciences* (Sage, 2013) 75.

to restricting the sample size of the first two ‘stakeholder’ categories. It is still better, however, to incorporate their perspectives than none at all, as the subsequent chapters will exemplify. Furthermore, the sample size of each category was restricted by the availability of willing participants. This is not problematic. Semi-structured interviews, as utilised here, lend themselves towards narrative building, eliciting rich responses through which opposing perspectives, even if small in number, can accurately and independently represent those viewpoints.

Asylum claimants were selected with the goal of ensuring sex/gender balance, and more broadly, geographic representation. Based on statistics of the largest asylum-producing states in the UK, doctrinal research and anecdotal experience on the nationalities of LGB asylum-seekers, this research sourced participants from three broad geographic regions: the Caribbean, sub-Saharan Africa, and the Middle East and South Asia.<sup>97</sup> The researcher sought an equal distribution of participants from each of these regions. Given the dominant prevalence of gay male experiences throughout the study of minority sexual identities, even within the asylum context, ensuring equal gender representation was important. This would not only foster greater representation of female voices, but would enable an intersectional investigation, i.e., looking into whether there are experiential differences of the system depending on one’s gender/sexual identity.

The researcher recognised that characteristics pertaining to his prior experience of the asylum system as a legal practitioner, and his personal identity could impact the execution of the research, including the way data was obtained from empirical research participants.<sup>98</sup> This thesis does not regard bias to be a problem within this research, recognising that many researchers frame the world according to their ‘pre-conceived ontologies’.<sup>99</sup> Avoiding this tendency would not necessarily remove the

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<sup>97</sup> UK Visas and Immigration, ‘Immigration Statistics, October – December 2014’ <<https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2014/immigration-statistics-october-to-december-2014#asylum-1>> accessed 22 July 2015.

<sup>98</sup> Norman K. Denzin and Yvonna S. Lincoln (eds), *Handbook of Qualitative Research* (2nd edn, Sage, 2000) 368; James J. Scheurich, ‘Social Relativism: A Postmodernist Epistemology for Educational Administration’ in Spencer J. Maxcy (ed), *Postmodern School Leadership: Meeting the Crisis in Educational Administration* (Praeger, 1994) 17-46.

<sup>99</sup> Mikkel Funder, ‘Bias, Intimacy and Power in Qualitative Fieldwork Strategies’ (2005) 4(1) *The Journal of Transdisciplinary Environmental Studies* 1, 2-6.

potential for bias or manipulation in the research process. Indeed, throughout the process the researcher has reflected on the influence of the ‘self’ on the project, the associated limitations relating to one’s world-view and the power relationships between the researcher and interview participants.<sup>100</sup> Moreover, as stated above, evaluation theory allows one to pursue research that is personal to oneself, and empowers researchers to entrench their values within their work, which this research also does.

The researcher also recognised the ethical implications of interviewing vulnerable asylum-seekers. The empirical research was thus designed with close consultation of the Social Research Association’s Ethical Guidelines.<sup>101</sup> The researcher successfully obtained ethics approval from the University of Liverpool Ethics Committee, as the research proposed was ethically sound. The ethical approval reference of the Committee is SLSJPhd1213/05. The researcher sought to adhere closely to ethical considerations, obtaining informed consent before each interview, and seeking to avoid or minimise the harm caused to research participants.<sup>102</sup> The ethical implications of the research were particularly important, given the vulnerability of asylum-seekers and the sensitivity of the topic being researched. For asylum-seekers, it is a legitimate fear that broaching certain topics within the interview could cause emotional distress or psychological harm, particularly for victims of trauma. Nonetheless, the risks to the interviewees were judged to be minimal for several reasons. Interviewees were free to ignore certain questions and were signposted to support services that provided free counselling and therapy. Furthermore, they were granted the ability to withdraw their participation in the research project at any point.

Informed consent was paramount. Anonymity was guaranteed to all asylum-seeker participants, alongside the confidentiality of the information exchanged within the interview. Also, all prospective participants were given the opportunity to fully consider the Participant Information Sheet supplied, which was explained to them,

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<sup>100</sup> *ibid* 7.

<sup>101</sup> Social Research Association, ‘Ethical Guidelines’ (2003).

<sup>102</sup> Martin Bulmer, ‘The Ethics of Social Research’ in Nigel Gilbert (ed), *Researching Social Life* (Sage, 2001) 49-50.

and to ask any questions. Interviews only proceeded upon the satisfaction of interviewees and a fair warning of the distress that could be caused to them.

When designing the empirical component of this study, close consideration was given to the idea that the research must adhere to the principles of ‘reliability, representation and validity’.<sup>103</sup> The researcher is confident of the credibility of the empirical work, as the design has remained faithful to the basic components of the refugee definition and the stages of UK asylum procedure. Moreover, the simplicity of the design means that it is easily replicable; the results are an absolute reflection of what has been studied. Additionally, as decision-making in this area is hypothesised to reflect a restrictive approach that affects claimants seeking protection on all other grounds, the research results could potentially extend beyond the minority group concerned.

A thematic analysis of the interviews was performed to provide the most incisive exploration, both of perspectives within a particular stakeholder category, and across the categories themselves. A thematic analysis generally begins with the process of deciding what the themes shall be and what will count as evidence of a theme before coding the transcripts for examples.<sup>104</sup> This thesis does not follow this procedure. Instead, the themes were derived from the law itself, from the components of the refugee definition, which claimants must prove they fulfil in order to be granted refugee status. The themes also follow the distinction between substantive and procedural fairness outlined in administrative law (Chapter two). For these reasons (alongside the preliminary hypothesis), the empirical work of this thesis is not rooted in grounded theory as many other qualitative research projects can be.<sup>105</sup> Nevertheless, the approach of the research is not to impose the ‘foreshadowed problems’ onto the data, but to allow the interviewees to lead the appraisal of the system, in the inductive tradition.<sup>106</sup>

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<sup>103</sup> Mandy Burton, ‘Doing Empirical Research: Exploring the Decision-Making of Magistrates and Juries’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge, 2013) 58.

<sup>104</sup> Gomm (n 89) 244.

<sup>105</sup> Barney G. Glaser and Anselm L. Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Transaction Publishers, 2009).

<sup>106</sup> David De Vaus, *Research Design in Social Research* (Sage, 2001) 6.



### 5.5.2. *Conducting the Empirical Research*

The process of carrying out the empirical research was largely unproblematic. From a shortlist drawn up of prospective professionals who could be interviewed, interviews were conducted with the following 10 individuals: Robert Wintemute, Professor of Human Rights at King's College London; Joël Le Déroff, Senior Policy and Programmes Officer at the European chapter of the International Lesbian and Gay Association (ILGA-Europe); S. Chelvan, Barrister at Law and PhD Candidate at King's College London; Catherine Robinson, Barrister at Law; Barry O'Leary, Partner (and Solicitor) at Wesley Gryk Solicitors; Liz Barratt, Associate (Solicitor) at Bindmans LLP; Paul Dillane, Refugee Researcher at Amnesty International UK; Erin Power, Executive Director at UK Lesbian and Gay Immigration Group (UKLGIG); Lillian Tsourdi, PhD Candidate at the Faculty of Law/Institute for European Studies of the Université Libre de Bruxelles; and Professional Participant A, a Support Worker within a British non-governmental organisation (NGO) that works with asylum-seekers.<sup>107</sup> The roles attributed to these interviewees were accurate at the time of conducting the interviews and may have changed since then.

Carrying out interviews with LGB asylum-seekers was challenging, as the difficulty in recruiting willing participants exceeded expectations. For example, the Lesbian Immigration Support Group in Manchester declined to participate. Their service users had given several interviews to other media organisations and researchers. Undoubtedly, this is the result of great media and academic interest, which has resulted in an element of 'saturation'. Despite this, a research vacuum has remained, which this thesis seeks to address. Such interviews have contributed to newspaper articles that lack the requisite legal analysis, and to a thesis that only examines lesbian asylum experiences, and again, not from a legal perspective. Still, it is understandable that the pool of potential accessible interviewees would be small, with many having shared their experiences already. Equally, finding the appropriate avenues to reach out to an often-invisible LGB asylum-seeker community rendered the recruitment

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<sup>107</sup> The researcher intended to anonymise all participants of the empirical research. Whilst conducting the interviews, however, several professionals stated their wish to be attributed to their contributions. Consequently, the researcher successfully obtained written consent from the other professional participants to attribute their quotes to them within this thesis. One participant declined, however. To ensure the participant's anonymity, they will be referred to as 'Professional Participant A' throughout this thesis.

process slow and laborious. Thus, the sample size of this stakeholder group was reduced to 20, as the process of sourcing and conducting interviews was too time-consuming.

The recruitment of participants was promoted through a blog and an academic twitter account. Several cases highlighted in the media were contacted, as were countless organisations supporting sexual minority refugees and asylum-seekers. The research received strong assistance from two support groups, the UKLGIG and Imaan, a group supporting LGBT Muslims, which the researcher volunteered for whilst researching and writing this thesis. Many participants came from these organisations. Several participants were recruited through social media-based outreach, and the participants from these three sources further contributed to the work by introducing the research to other LGB asylum-seekers and refugees within their social networks. Thereupon, ‘snowball sampling’ had the greatest impact upon participation. Participants reached into their communities on behalf of the researcher, and after conducting the interview, encouraged reticent or anxious friends to volunteer.

Interviewing LGB asylum-seekers was a rewarding process. Interviewees had no expectations beyond their desire to ensure improvements to the system for LGB claimants that would seek protection in the UK after them. They were made aware of and remained untroubled by the inability of the researcher to help their own cases. In many instances, participants had already obtained refugee protection. Building a relationship of trust was important to facilitating maximum disclosure. The researcher sought to achieve this in the preliminary stages, when the researcher and participant went through the Participant Information Sheet. Interviewees were guaranteed confidentiality, anonymity and the ability to withdraw participation at any stage. They were allowed to construct their memories as they wished, as the questions were simply a guideline. They could decline to answer any question. Emphasising the goals of the research (to make recommendations for an improved system, where necessary) and ensuring that the interview was an empowering process for the participant ensured that the interview stage of the empirical research went smoothly. One interview was conducted in Urdu, a mother tongue of both the participant and the researcher, and this decision elicited a stronger interviewer-

participant dynamic, and data that was more rich and detailed than it could have been otherwise, but also more emotive.

Upon completion of the interviews, it transpired that the sampling strategy for LGB asylum-seeker and refugee participants had been successful. It ensured equal representation between those who identify as men and women, conducting 10 interviews each. There was a reasonable geographic spread. Of the 20 interviews conducted, 7 participants were from Sub-Saharan Africa, 10 from the Middle East and South Asia, and 3 from the Caribbean. Recruiting participants from the Caribbean was made more difficult by the non-responsiveness of the organisations that were approached for their African and Caribbean LGB membership, such as Proud Diamond and Movement for Justice. Within the, admittedly, large geographic category of the Middle East and South Asia, 3 participants were from the Middle East, whilst 7 were from South Asia. This was because of the difficulty in obtaining willing participants and the impact of ‘snowballing’ on the non-probability quota sampling. It is difficult to know if this is representative, however, as there are no statistics available on the origins of LGB asylum-seekers specifically.<sup>108</sup>

It is undoubtedly for these reasons, particularly ‘snowballing’, that Uganda and Pakistan were the most represented countries of origin amongst the participants (3 Ugandans and 5 Pakistanis). This was noted whilst the empirical work was being conducted and, so, prospective interviews with other willing participants from these countries were not pursued. The research results will show that the interviews have provided data that illuminate the current state of the British asylum system, as experienced by LGB asylum claimants, whilst representing, to some degree, the regions producing the largest number of LGB refugees.

More data is available on the demographic makeup of the asylum-seeker participants (see Appendix A). For example, English language proficiency amongst participants was high, aside from two interviewees, one male and one female. In terms of

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<sup>108</sup> That said, information on the ten largest asylum-origin states over 2014 and 2015 suggests that the geographic areas of representation chosen are broadly accurate. See, Refugee Council, ‘Quarterly Asylum Statistics’ (May 2015) <[https://www.refugeecouncil.org.uk/assets/0003/4620/Asylum\\_Statistics\\_May\\_2015.pdf](https://www.refugeecouncil.org.uk/assets/0003/4620/Asylum_Statistics_May_2015.pdf)> accessed 8 March 2016.

religion, 12 participants (five women and seven men) identified as Muslim, three participants identified as Christian (all women), and for five participants, their religion was undisclosed (two women and three men). Moreover, in terms of marital status, 13 were single (five women and eight men), four were married (three women and one man), an additional two participants stated that they were divorced (one woman and one man), and the marital status of a single participant was undisclosed (a woman). Finally, in terms of age range, seven participants were 20-29 years old (three women and four men), seven were 30-39 (four women and three men), and six were 40-49 (three women and three men), amounting to a relatively even split.

During the process of interviewing asylum-seekers, MASY005, a participant of Indian origin, decided to supply the researcher with his Reasons for Refusal letter from the Home Office. The appeal against the refusal of his asylum claim had just failed and he had decided to return to India voluntarily. For the sake of parity, the researcher requested the other asylum-seeker participants who had seen their claims refused for access to their Reasons for Refusal letters, but the other participants were unable or unwilling to supply them for various reasons. Thus, although an information disparity exists between the case of MASY005 and the other participants who were issued with refusal letters, having a copy of MASY005's letter has been extremely useful. Indian asylum applicants hold a precarious position in the UK due to the legal status of criminal sanctions within this country,<sup>109</sup> and for this reason, India acts as a useful viewpoint, through which the operation of the system can be investigated with scrutiny.

Incorporating the perspectives of decision-makers was the most challenging aspect of the empirical work. From interviews with certain legal practitioners and discussions with the thesis supervisors, it became clear that successfully requesting the cooperation of the Home Office to interview caseworkers was unlikely. An alternate strategy was devised, due to the importance of incorporating the perspectives of decision-makers. Thus, the prospective interview questions for Home Office

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<sup>109</sup> Dhananjay Mahapatra, 'Supreme Court Makes Homosexuality a Crime Again' *The Times of India* (12 December 2013) <<http://timesofindia.indiatimes.com/india/Supreme-Court-makes-homosexuality-a-crime-again/articleshow/27230690.cms>> accessed 15 April 2015.

caseworkers were submitted in the form of an FOI request.<sup>110</sup> The first FOI request was submitted on 28 March 2013 and a response was received on 9 October 2013. This was followed by a second FOI request on 6 May 2014, to which a response was received on 13 June 2014. The FOI requests queried the existence of statistics regarding the determination of sexual identity-based asylum claims, the production of objective evidence in relation to country conditions for LGB people, and training received by Home Office decision-makers on considering LGB claims. As the replies to these FOI requests produced detailed information regarding the Home Office's perspectives, it was unnecessary to pursue interviews with their caseworkers.

Furthermore, to enhance the depth with which the position of the Home Office is understood, the analysis draws from the Asylum Policy Instructions on sexual identity and gender issues, and on assessing credibility. During this process, a former decision-maker of the Home Office contacted the researcher through social media and volunteered to participate in the research, providing anonymity was guaranteed. Therefore, through a lengthy interview, the participant has attempted to represent the procedure and rationale of the Home Office and of the decision-maker category as a whole. This, together with the Instructions and Freedom of Information requests, has enabled the research to achieve triangulation.

For the Judiciary, a request was made to the Ministry of Justice to interview a sample of judges from the Immigration and Asylum Chamber on 28 June 2013. Although a response seeking further information was received on 14 August 2013, there was no further response to the answers that were submitted on 5 October 2013. As a result, there is an absence of judicial perspective in this research. This could not be addressed due to the failure of the Ministry of Justice to outright grant or reject the request for access.

Participant interviews were audio-recorded and transcribed. The transcripts were then subjected to a thematic analysis using NVivo software, according to themes constructed around components of the refugee definition and the asylum procedure.

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<sup>110</sup> The Freedom of Information Act 2000 gives the public the 'right to access' information held by public authorities.

Codes were created on the basis of the doctrinal research and empirical data. The initial set of codes drew from the refugee definition, using each criterion or issue relating to the definition as a separate code. The additional codes focused on the procedure and on the elements of procedural fairness embedded in the structural principles. Thus, they attached to the stages of the legal procedure, such as the screening interview, substantive interview and detention, and to the second theme of the structural principles, such as legal representation and guidance (see Chapter two). This provided the researcher with easy access to the data collected on each particular issue, for analysis (by juxtaposing it with the data drawn from doctrinal sources) and inclusion in Chapters three and four. This analysis was supplemented by an analysis of the responses to the FOI requests (which supplied the materials through which Home Office caseworkers were trained on sexual orientation issues), the aforementioned Asylum Policy Instructions, and doctrinal sources. This thesis will evidence that the qualitative research enabled a real and current appraisal of the British asylum system against the analytical framework provided by the ‘structural principles’. The researcher believes that 31 interviews, two FOI requests, and an analysis of Home Office asylum policy documents have helped to produce a representative and triangulated piece of work. Should it somehow be considered not representative enough of the experience of LGB asylum-seekers in the UK, it nonetheless contributes significantly to, and substantially expands, the pre-existing knowledge on how the British asylum system’s responsibilities towards sexual minority refugees must be conceived.

## 6. Thesis Structure

The following chapters of the thesis set out the foundations and terms of the theoretical framework through which the British asylum system will be evaluated, followed by the appraisal itself. Extracts from the interview transcripts and from the responses to the FOI requests are integrated throughout to meet the objective of analysing the system through the study of the three main stakeholder categories.

*Chapter Two* provides the theoretical and analytical basis for investigating the British asylum system. It explores the concept of fairness as an identifiable legal standard embedded within UK law through legal philosophy, administrative law, and international and supranational treaties. Having established why fairness is the appropriate standard for the investigation, the chapter will use the provisions espoused to advance the ‘structural principles’. This is an analytical, legal framework setting out how the asylum claims of LGB asylum-seekers should be evaluated, underpinned by the concepts of intersectionality and diversity of sexual identity. The ideal legal system set out in this chapter will then be used to evaluate the practices of decision-makers in the British asylum system when tasked with RSDs of sexual minority claims.

*Chapter Three* begins the process of evaluating the British asylum system for sexual minority claimants from a substantive fairness perspective, using the framework (‘structural principles’) espoused in the previous chapter. Deconstructing the refugee definition, this chapter evaluates issues pertaining to the claimant’s duty to establish that they have a ‘well-founded fear of persecution for reasons of membership of a particular social group’. It explores how the definition of ‘persecution’ has evolved within the area of asylum, before analysing how issues concerning the thresholds of persecution arise in the LGB context. This covers the criminalisation of same-sex sexual practice in many asylum-producing states, whether psychological violence can constitute persecution, and the role of discretion in RSDs after *HJ (Iran)* established that ‘acting discreetly’ to avoid maltreatment was persecutory. It then examines the quality and use of Country of Origin Information reports in the LGB context. Finally, it explores meaning of the notion of ‘particular social group’ and its implementation in the LGB context.

*Chapter Four* addresses procedural aspects of the system, focusing particularly on the way that ‘credibility’ is utilised as the main means of evaluating the ‘believability’ of an asylum claim. As part of this, the chapter explores how assumptions regarding plausible or likely human behaviour, the impact of trauma on memory and recollection, and the role of ‘truth’ in credibility assessments have affected the system’s ability to correctly decide claims in this area. Additionally, the chapter addresses other procedural matters, including the subjection of LGB claimants to

detention and accelerated procedures, and the recruitment, training and conduct of the British asylum system personnel.

*Chapter Five*, the concluding chapter, ties together the issues identified in relation to the preceding investigation of the British asylum system from the sexual minority perspective. It will make final remarks regarding the British system's consistency with the theoretical framework utilised to conduct the analysis, as outlined in Chapter two. It will also comment on the overall fairness of the system and provide, if necessary, substantive recommendations on the areas for potential improvement.<sup>111</sup>

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<sup>111</sup> Timothy Endicott, *Administrative Law* (OUP, 2009) 121.



## Chapter Two

### **The Theoretical Foundation and Analytical Framework: Fairness as a Legal Standard and the ‘Structural Principles’**

#### 1. Introduction

This chapter will explain the decision to investigate from the perspective of fairness the British asylum system as it applies to LGB asylum-seekers. The key reason for using fairness as the foundation for this thesis is that fairness is the touchstone of the British legal system, in particular in the public and administrative law of the UK. It is also the guiding principle of international human rights law vis-à-vis the treatment of refugees and their claims for asylum. Accordingly, fairness will dictate whether the current UK system appropriately deals with the asylum claims of LGB claimants. This is done through the advancement of a framework of ‘structural principles’ that need to be followed to achieve a fair system for processing claims of asylum for LGB claimants.

Furthermore, as evaluation theory informs this research project, fairness embodies certain essential values of this thesis regarding the way asylum-seekers’ refugee protection claims should be decided.

#### 2. Why is Fairness the Appropriate Standard in an Investigation of the British Asylum System?

Much has been written about the extensive obligations owed by a state to its citizens. The place of the ‘alien’, such as an asylum-seeker, within the state-citizen contract is unclear, however.<sup>1</sup> This thesis contends that a state also owes obligations to non-

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<sup>1</sup> Denis J. Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (OUP, 1996) 31.

citizens, which are articulated by the concept of fairness. Thus, the duties of fairness are not predicated on an individual's citizenship, but a state's 'control' over the individual.

The right to fair treatment is a central notion of legal philosophy. Legal philosophy has answered significant questions regarding the importance of fairness, the purpose of the rule of law, and the relationship between society and the governing state. These questions, and the plethora of responses attempting to answer these questions, have influenced the attitudes taken towards fairness within the British legal system, as this chapter will evidence. Fairness is an accepted legal standard within UK law. As the rule of law underpins the British legal system, a law does not rule a state unless:

[T]he life of the community is governed by clear, open, stable, prospective, general standards, government officials adhere to those standards, and there are independent tribunals (i.e. courts) that regulate the conduct of other institutions.<sup>2</sup>

This is reinforced by the 'associated principle' of due process, which encapsulates the belief that 'all governmental decisions ought to be made by processes that put the relevant considerations effectively before the decision-makers'.<sup>3</sup> As a result:

A decision is unfair if it wrongly neglects the interests of a person it affects. It is procedurally unfair if it wrongly neglects a person's interest in participating in the process; it is substantively unfair if its outcome wrongly injures a person's interest.<sup>4</sup>

This forms the fundamental basis of understanding fairness for the purposes of this investigation. Separating fairness into its procedural and substantive halves provides a logical structure for this thesis. Procedural fairness broadly relates to the asylum

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<sup>2</sup> Timothy Endicott, *Administrative Law* (OUP, 2009) 18.

<sup>3</sup> *ibid* 21.

<sup>4</sup> *ibid* 121.

procedure itself. Substantive fairness relates to the outcome of the RSD, although each component also has implications for the other.

## **2.1 The ‘Duty to Act Fairly’ is Rooted in Legal Philosophy**

Looking to the origins of the fairness concept can help us to understand and elucidate what constitutes fair treatment in the context of LGB asylum claimants. Many theorists sought to ‘isolate the special character of justice and fairness’.<sup>5</sup> Hart explained that fair treatment concerns the idea of treating ‘like cases alike’.<sup>6</sup> More illustratively, Finnis argued that fair treatment addresses three elements: first, relations between persons; second, what duty is owed to one another; and thirdly, an element of equality or proportionality.<sup>7</sup> To this, Galligan argues in favour of a fourth component, that the actions concerned ‘comply with certain fundamental standards of right treatment’.<sup>8</sup> For the purposes of this thesis, this is our basic understanding of the fairness concept.

Social contract theory has also made an important contribution towards our understanding of why fairness is such a critical concept. Through some of its most famous proponents, such as John Locke and John Rawls, social contract theory advances how fairness mediates the fundamental relationship between the state and the individual.<sup>9</sup> The nature of this relationship warrants some scrutiny, however, given the question of whether the state owes duties of fair treatment only to its citizens, or whether they are owed to all those within their jurisdiction and control, including asylum-seekers. Certainly, the work of Locke and Rawls could be interpreted as being inclusive in this way. Fairness provides the equilibrium between contracting parties that is naturally agreed upon when neither party has an advantage over the other.<sup>10</sup> It would be inadmissible to argue that access to fair treatment depends upon the individual’s status in a society.

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<sup>5</sup> Galligan (n 1) 56.

<sup>6</sup> H.L.A. Hart, *The Concept of Law* (Clarendon Press, 1961) 163.

<sup>7</sup> John M. Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) 161.

<sup>8</sup> Galligan (n 1) 57.

<sup>9</sup> Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality and Species Membership* (Belknap Press, 2007) 10-11.

<sup>10</sup> John Locke, *Second Treatise of Government*, 4 and 98; John Rawls, *A Theory of Justice* (OUP, 1999) 19

In the context of refugee law, it is the work of Ronald Dworkin that we can draw the most from to understand why fair treatment is intrinsic to the application of the law and how it can be articulated as a fundamental right. Fairness is encompassed by the principle of ‘equal concern and respect’.<sup>11</sup> Dworkin stipulated that anyone who takes ‘rights seriously’ must accept the connected notions of human dignity and political equality,<sup>12</sup> notions that are significant in the LGB asylum context. The principle of equal concern and respect is posited as a political right, the core principle of political morality, which compels governments to treat with respect their citizens and all those within their jurisdiction.<sup>13</sup>

Dworkin also underscores the importance of the right to fair treatment through an alternate argument. Rights are presented as protective measures. Rights are articulated into the political and legal context to provide safeguards to individuals, against the inevitable decay of democratic institutions.<sup>14</sup> Thus, rights ensure that democratic institutions treat individuals properly. A right would exist against a party, a state, or an institution, where for some reason it would be wrong to treat a party in such a way, despite the persuasive considerations in favour of that treatment. Accordingly, although the immigration context contains sufficiently coercive justifications for not treating LGB asylum-seekers fairly, the potential affront to their dignity means that the public authority is compelled to adhere to the standards of fair treatment.

Dworkin also acknowledged that the protection of minorities must be the central constituent element of any theory of rights and justice. He warned against the political principle of ‘majoritarianism’, where political and legislative decisions are made to benefit the majority.<sup>15</sup> As ‘majoritarianism’ can easily lead to the dismissal of the rights of minorities, it is imperative that minority rights play an inalienable role

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<sup>11</sup> Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) 199.

<sup>12</sup> *ibid.*

<sup>13</sup> *ibid* 272.

<sup>14</sup> *ibid* 90.

<sup>15</sup> *ibid* Ch 5.

in the structure and content of the standards of fairness.<sup>16</sup> This addresses the relationship between fairness and rights, highlighting that the protection of the fundamental rights of all, especially minorities vulnerable to marginalisation, is an important component of fairness. Thus, as members of a particularly vulnerable minority group, LGB refugees are entitled to access a fair asylum procedure and obtain a fairly constituted decision. These rights are theoretically inviolable, given how deeply such a failure could puncture their dignity, integrity and the very security of their lives. Fairness towards minorities, therefore, involves ensuring that their basic rights are guarded to ensure respect for their inherent dignity.

Thereupon, Dworkin introduces the legal concept of ‘law as integrity’, which requires ‘a government to extend the same substantive standards of justice or fairness it uses for some’.<sup>17</sup> He argues that a state applying the standards of fairness and justice inconsistently lacks integrity, due to its failure to endorse across the board what it has allowed for some. It is incumbent upon decision-makers to ‘protect political liberties’ and decide cases according to the methodology of constructive interpretation.<sup>18</sup> Thus, although LGB asylum-seekers are not citizens of asylum-receiving states, they are still entitled to fair treatment and protection of their fundamental rights as individuals contracting with the same state. From Dworkin it becomes clear that the fair treatment of asylum-seekers is integral to confidence in, and the respectability of, both the public authority and the state.

Therefore, by looking into the origins of the fairness concept, we gain insight into why it plays a key role in mediating the application of the law, especially by the bodies of the state. Fair treatment is the fundamental governing principle of the state-individual relationship, arguably because such standards would be chosen if both parties were operating from an equal and balanced contracting position. More concretely, ensuring that political structures adhere to standards of fair treatment helps to preserve the core dignity of all human beings. Fairness provides safeguards against the potential abuse of the state’s power. It is also critical to ensuring that

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<sup>16</sup> *ibid.*

<sup>17</sup> Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 165.

<sup>18</sup> *ibid* 226.

minority rights are given equal importance to the interests of the majority. Without law being applied on a non-discriminatory basis, a state lacks integrity. Each of these arguments resonates strongly within the asylum context, despite the fact that immigration and asylum law is inherently discriminatory on the basis of immigration status/nationality.

This foundation will be now expanded in the following two sub-sections to identify how fairness has emerged as a concrete legal concept in administrative law and through international and supranational treaties.

## **2.2 Fairness as a British Standard through Administrative and International Law and Supranational Agreements**

Fairness, in terms of the state's duty to act fairly and the individual's right to be treated fairly, is an embedded feature of UK law. This is evident mainly in two areas: administrative law, and the supranational and international treaties to which the UK is a signatory.

Examining fairness through the lens of administrative law is essential. This thesis recognises that principles of fairness in administrative law act as limitations upon the exercise of public law power by authorities such as the Home Office. Administrative law, i.e., 'the law relating to the control of government power', ensures that public authorities exercise their duties fairly.<sup>19</sup> Administrative law is described as 'ensuring governmental accountability, and fostering participation by interested parties in the decision-making process'.<sup>20</sup> This thesis takes a 'rights-based approach' to administrative law, reinforcing its conception as being 'based on the standards of legality to prevent abuse of power by public bodies'.<sup>21</sup>

Most significantly, perhaps, fairness has also developed as a substantive legal concept through increasing international legal cooperation. Beginning in the late twentieth century, this collaboration includes the international human rights regime, which was

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<sup>19</sup> Paul Craig, *Administrative Law* (7th edn, Sweet & Maxwell, 2012) 3.

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid* 16.

directly inspired by Locke.<sup>22</sup> The codification of rights as items that human beings possessed and to which they were entitled began with the French Declaration of the Rights of Man and of the Citizen in 1789 stating that ‘men’ were ‘born and remain free and equal in rights’. From the eighteenth century onwards, natural rights gradually became less acceptable to philosophers and theorists, such as Hume, Bentham and Mill.<sup>23</sup> The Holocaust of the Second World War resulted in state leaders returning to natural rights as a means of securing human life and dignity. Consequently, the ‘preservation of life’, in the tradition of Locke, led to the institutionalisation of rights protection through two key mechanisms of international collaboration. The first was the 1948 United Nations Declaration of Human Rights (UNDHR), the precursor to two international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The second was the 1951 UN Convention Relating to the Status of Refugees (‘Refugee Convention’), establishing an agreement (and set of principles) broadly outlining the commitment of signatory states to share in the responsibility of protecting genuine refugees.

International human rights instruments, like the UNDHR and the Refugee Convention have helped to institutionalise rights, including the right to fair treatment, into the fabric of the law. Fairness exists now as more than just theory, embedded as tangible rights and entitlements in the operation of the UK legal system.

Arguably, the greatest contribution to procedural and substantive fairness within the UK comes from the ‘European Frontier’. Those accessing legal procedures or relying upon their core entitlements in the UK have benefited greatly from the UK’s ratification of the European Convention on Human Rights<sup>24</sup> (ECHR or ‘the Convention’), and subsequent further effect given within domestic law through the Human Rights Act 1998. Moreover, the UK’s membership of the European Union (EU) has made a pivotal contribution to fairness as a legal concept (see Appendix B).

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<sup>22</sup> Burns H. Weston, ‘Human Rights’, in Richard P. Clause and Burns H. Weston (eds), *Human Rights in the World Community: Issues and Actions* (2nd edn, University of Pennsylvania, 1992) 16.

<sup>23</sup> *ibid.*

<sup>24</sup> ‘Convention for the Protection of Human Rights and Fundamental Freedoms’ (European Convention on Human Rights, as amended) (ECHR) (1953).

This is especially in the light of the EU's decision to create a harmonised asylum system binding upon all Member States,<sup>25</sup> and the development of a separate rights instrument, the Charter of Fundamental Rights of the European Union (EU Charter or 'the Charter').

### 2.2.1. *Fairness in Administrative Law*

Within administrative law, the constraints imposed upon the exercise of public powers are rooted in natural justice. Natural justice describes the evolution of a body of rules and minimum standards conveying the duty to act fairly upon those with decision-making capacities.<sup>26</sup> Natural justice is synonymous with fairness; the less an exercise of decision-making power resembles a 'judicial' or 'quasi-judicial' matter, the more appropriate it is for the term 'fairness' to be used over natural justice.<sup>27</sup> The duty to act fairly has specific goals: to provide accurate decision-making,<sup>28</sup> to guarantee objectivity and impartiality,<sup>29</sup> and to protect human dignity by enabling an individual to participate in a decision, particularly when it is unfavourable.<sup>30</sup>

Each of these goals is essential to the fair and proper operation of the British asylum system. Undoubtedly, they are based on the values extrapolated from the previous section, representing, for example, principles that would arise from the 'original' contracting position. Natural justice applies where 'a right, interest or legitimate expectation' exists.<sup>31</sup> It is not intended to be a 'precise and uniform code of procedure'.<sup>32</sup> That said, what will constitute fair treatment will vary, depending on

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<sup>25</sup> This competence was confirmed by the 'Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts' 1997 O.J. (C340), now found in 'Treaty on the Functioning of the European Union' (TFEU) (26 October 2012) (C326/49), arts 77-80.

<sup>26</sup> Bernard Schwartz, 'Administrative Procedure and Natural Law' (1953) 28(2) *Notre Dame Lawyer* 169, 182.

<sup>27</sup> Craig (n 19) 345. See also, *McInnes v. Onslow-Fane* [1978] 1 WLR 1520 [1530].

<sup>28</sup> David Resnick, 'Due Process and Procedural Justice', in James R. Pennock and John W. Chapman (eds), *Due Process* (Nomos, 1977) 217.

<sup>29</sup> Rawls (n 10) 210.

<sup>30</sup> Frank Michelman, 'Formal and Associational Aims in Procedural Due Process' in Pennock and Chapman (n 28) Ch. 4. See also, *R v. SSHD, Ex Parte Doody* [1994] 1 A.C. 531 HL [551].

<sup>31</sup> Craig (n 19) 340.

<sup>32</sup> Stanley De Smith and Rodney Brazier, *Constitutional and Administrative Law* (8th edn, Penguin, 1998) 540.



the importance of the right or interest at issue, the value of the right to fair treatment, and the cost of providing this treatment.<sup>33</sup> In other words, the doctrine is also concerned with substantive justice, encouraging decision-makers to consider whether a particular framework will improve the standards of fairness without leading to inefficacy, delay or unjustifiable expense (see Appendix B).<sup>34</sup>

Fairness plays a critical role in the asylum process from the administrative perspective. Given that a life may be at stake if a claim is rejected (for example, resulting in a person being sent back to their home country), a higher standard of fairness is expected of public authorities exercising decisions where the individual's physical and mental safety is concerned. In the same regard, due process is absolutely necessary in the criminal justice system, where the accused's liberty is at stake.

In some areas of law, there are different legal systems in place within the UK. Administrative law has devolved status in Scotland, but asylum law does not.<sup>35</sup> Consequently, although the case-law in this section is primarily from the courts of England and Wales, this thesis contends that the principles extracted would apply across legal systems within the UK, and other asylum-receiving jurisdictions as well.<sup>36</sup>

The first case to address the right to be treated fairly within administrative law was *Ridge v. Baldwin*.<sup>37</sup> Here, the Chief Constable of Brighton was dismissed without a hearing by the local police authority. The House of Lords held that it was within the rights of the complainant to be granted a hearing. Lord Reid emphasised that a decision-making body, judicial in nature or not, was responsible for providing a fair hearing.<sup>38</sup> This was especially the case where the decision potentially caused harm to the individual concerned. *Ridge* was a landmark decision, as it broadened the remit of

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<sup>33</sup> Craig (n 19) 340.

<sup>34</sup> De Smith and Brazier (n 32) 542.

<sup>35</sup> See, the Scotland Act 1998.

<sup>36</sup> This is especially so given that the cases referenced pre-date the creation of the Scottish parliament in 1999.

<sup>37</sup> *Ridge v. Baldwin* [1964] AC 40 (Lord Reid).

<sup>38</sup> *ibid.*

fairness and dismissed the perception that natural justice did not apply to administrative cases. It also entitled judges to balance the standards of fairness against efficiency considerations, to determine the appropriate standards in a particular setting.<sup>39</sup> Following *Ridge*, in the case of *Re HK* the court also found a duty to act fairly entrenched in the principles of natural justice.<sup>40</sup> Lord Parker CJ stated that it was not ‘a question of being required to act judicially but of being required to act fairly...to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly’.<sup>41</sup> *Re HK* reinforced the legitimacy of the duty to act fairly: even decisions and policies that appeared to be legal needed to be consistent with the principles of natural justice. The primacy of fairness in decision-making was, thereby, re-established in the English courts. Moreover, the decision provided a more expansive standard of fairness that incorporated not only procedural elements, but also addressed the substantive components of fairness regarding the duty to produce a correct decision.<sup>42</sup> This embodies the aforementioned two-pronged nature of fairness, procedural and substantive, that is clear in administrative law and important to the asylum context.

From this general duty to act fairly, the English courts have developed five tangible sub-principles of procedural fairness within administrative law (Appendix B). The first principle is the rule against bias. For a society to accept that the decision is procedurally and substantively fair, it must have been made by an independent and impartial adjudicator.<sup>43</sup> The matter of partiality speaks directly to a key epithet of justice that addresses perception and reality; justice may still be served if a decision-maker holds a particular bias, but justice must also be ‘seen to be done’.<sup>44</sup>

The court sought to provide objective guidance on when a suspicion of impartiality should be explored. This was challenging. In order for a society to believe in the

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<sup>39</sup> De Smith and Brazier (n 32) 534; *R v. Gaming Board for Great Britain, Ex Parte Benaim and Khaida* [1970] 2 GB 417 [430] (Lord Denning).

<sup>40</sup> *Re HK* [1967] 2 QB 617.

<sup>41</sup> *ibid* (Lord Parker CJ).

<sup>42</sup> Lawrence G. Baxter, ‘Fairness and Natural Justice in English and South African Law’ (1979) 96 South African Law Journal 593, 625.

<sup>43</sup> John Alder, *Constitutional and Administrative Law* (9th edn, Palgrave Macmillan, 2013) 397.

<sup>44</sup> *R v. Sussex Justices, Ex Parte McCarthy* [1924] 1 KB 256 [259] (Lord Hewart).

decision-making power of public authorities, a balance must be struck between maintaining public confidence and preventing ill-advised challenges from being taken seriously.<sup>45</sup> Thus, the court first proposed a test for bias in the case of *R v. Gough*, which stated that impartiality should be examined where there was a ‘real danger or possibility’ of bias.<sup>46</sup> The *Gough* test was criticised by courts in several other jurisdictions for giving precedence to the court’s observation of bias over the public’s perceptions.<sup>47</sup> The Court of Appeal returned to the test in *Porter v. Magill*, revising it so that the appropriate query was for a judge to consider whether, in the view of a ‘fair-minded and informed observer’, there was a real possibility of bias.<sup>48</sup> The rule against bias acknowledges that the public’s perception of impartiality, particularly amongst those relying on an interest or benefit from a public authority, is fundamental to the fair exercise of public authority power. Thus, through this test administrative law advances a mechanism to hold public authorities accountable for discrimination within the exercise of its power.

The second sub-principle of procedural fairness is the right to legal representation. The right is not absolute. Understandably so, in the exercise of power by many public authorities, legal representation is unnecessary or would delay or hinder the decision-making process.<sup>49</sup> Instead, the right to representation is contingent on certain factors, such as whether the process is adversarial, the importance of the interest at stake, the capacity of a person to present their case without representation, and the legal complexity involved in making the decision.<sup>50</sup> It is also grounded in how challenging the legal procedure is, i.e., whether the duty of fairness mandates an individual has assistance from a competent legal representative.<sup>51</sup> The more a person has at stake and the greater the severity of a potential sanction, the greater the need for an individual to be supported by adequate legal representation.<sup>52</sup> Moreover, research

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<sup>45</sup> Alder (n 43) 397-399.

<sup>46</sup> *R v. Gough* (1993) AC 646; *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700.

<sup>47</sup> Craig (n 19) 417.

<sup>48</sup> *Porter v. Magill* [2002] 2 AC 357 HL [102-103].

<sup>49</sup> Craig (n 19) 369.

<sup>50</sup> *ibid* 370.

<sup>51</sup> *ibid* 164.

<sup>52</sup> *Pett v. Greyhound Racing Association Ltd* [1969] 1 QB 125.

into the workings of several tribunals has found that the success rate of claimants improved significantly where they were legally represented.<sup>53</sup>

The third sub-principle of fairness is the right to notice, i.e., to be informed of the complaint or charges against a person. In the case of *Kanda*, Lord Denning set out that the right to a hearing was accompanied by the right to be informed of the case that was involved: ‘if the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him’.<sup>54</sup> This is extremely important to the asylum context, as the right to notice also includes the right to know the basis on which a decision is made, the evidence used,<sup>55</sup> and ‘the right to be given a reasonable amount of time to prepare the case’.<sup>56</sup>

The fourth sub-principle of fairness is the duty of the public authority to communicate the reasons for its decision to the individual. The courts argued that either such a duty must be stated or implied in a statute, or there must be a ‘special justification’ or legitimate expectation that reasons will be communicated.<sup>57</sup> Lord Mustill noted the support within the English courts towards the full disclosure of an authority’s reasoning, identifying ‘a perceptible trend towards an insistence upon greater openness in the making of administrative decisions’.<sup>58</sup> This recognition has developed so that where the subject matter is appropriately serious (this represents more than simply the consequences of an adverse decision), one can apply to have the decision quashed on grounds of the failure to give reasons, irrespective of the case’s core merits.<sup>59</sup>

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<sup>53</sup> Hazel Genn and Yvette Genn, *The Effectiveness of Representation at Tribunals* (Lord Chancellor's Department, 1989) 25-35; Tom Mullen, ‘Representation at Tribunals’ (1990) 53 MLR 230, 230 and 232.

<sup>54</sup> *Kanda v. Government of Malaysia* [1962] AC 322 [337].

<sup>55</sup> Galligan (n 1) 356.

<sup>56</sup> *R v. Secretary of State for the Home Department, Ex Parte Anufrijeva* [2004] 1 A.C. 604 [26].

<sup>57</sup> *Doody* (n 30) [546].

<sup>58</sup> *ibid* [561].

<sup>59</sup> *Craig* (n 19) 341.

The final sub-principle of fairness is the right to be consulted before a benefit is denied. Alternatively known as the doctrine of ‘legitimate expectation’, it was developed to defeat administrative decisions where the consultation rights demanded by fairness were not granted.<sup>60</sup> In the case of *Schmidt v. Secretary of State for Home Affairs*, Lord Denning rejected the trial judge’s argument that natural justice was not applicable because the decision was neither judicial, nor quasi-judicial in nature.<sup>61</sup> He dismissed this distinction as ‘no longer valid’ and referenced *Ridge* in affirming the ‘legitimate expectation’ of the opportunity to make representations before being deprived of something.<sup>62</sup> In the case of *McInnes v. Onslow-Fane*, the dicta of Megarry VC articulated the scenarios under which legitimate expectation could exist.<sup>63</sup> Where the content of the undertaking, policy guideline or conduct of a body leads an individual to expect that they will be granted specific treatment and a hearing before an independent tribunal, this should generally be granted. These ‘may be called the expectation cases, which differ from the application cases only in that the applicant has some legitimate expectation from what has already happened that his application will be granted.’<sup>64</sup> In the case of *GCHQ*, Lord Diplock also expanded upon the circumstances that would be applicable.<sup>65</sup>

Accordingly, the legitimate expectation doctrine grants the right of judicial review to individuals with a real expectation that either the decision would be favourable or that they would be properly consulted and heard before they were refused.<sup>66</sup> This is not a full legal entitlement; it exists as an interest, which can be utilised to apply for the judicial review of an adverse administrative decision. It also ensures that decision-makers continue to make decisions that follow the law and correct procedure, understanding that if their decisions are defective, they will be reviewed and even quashed.<sup>67</sup> In the refugee context, the doctrine is necessary, especially given the

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<sup>60</sup> *ibid* 340.

<sup>61</sup> *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149 [170].

<sup>62</sup> *ibid* [170].

<sup>63</sup> *McInnes* (n 27) [1527-1530].

<sup>64</sup> *ibid* [1528-1529].

<sup>65</sup> *GCHQ* H.L. 1984; [1985] Appl. Cas. 374 [408].

<sup>66</sup> Robert E. Riggs, ‘Legitimate Expectation and Procedural Fairness in English Law’ (1988) *The American Journal of Comparative Law* 395-436, 396.

<sup>67</sup> Peter Cane, *Administrative Law* (5th edn, OUP, 2011) 77-80.

increasing tendency for RSDs to turn on issues of credibility, as Chapter five of this thesis will demonstrate. Where decision-makers make assumptions regarding the persecutory narratives of asylum-seekers, it is crucial that asylum-seekers have the opportunity to refute or clarify these issues.

Consequently, these principles demonstrate that the decision-making power of any public decision-making body in the UK, including the Home Office, is inhibited by the obligation under administrative law to act fairly and manifested by the five principles described above. This thesis acknowledges that the exact nature of the fair treatment that should constrain decision-making depends on a number of factors, such as the nature of the decision-making power, the potentially adverse consequences upon the claimant, and the demands of the wider public interest.<sup>68</sup> Nonetheless, it is clear that the duties owed by the Home Office are at the higher end of the scale in the light of the seriousness of the consequences to the asylum-seeker if refugee protection is to be denied. Having established that the duty to act fairly is entrenched within UK administrative law, operating as a standard attached with significant substance and meaning, this thesis proceeds to examine how the UK's international and supranational obligations also hold the Home Office's asylum decision-making powers to scrutiny.

### 2.2.2. *Fairness in International and Supranational Law*

This thesis contends that the standards arising from the ECHR, the EU Charter and the EU as an organisation further entrench fairness as a standard in UK law (Appendix B). They further legitimise the use of fairness as the standard for the investigation within this thesis, and offer guidance on its substance.

The ECHR plays an important role in refining the standards of fairness in UK law. Article 6 ECHR protects the right to a fair trial in both the criminal and civil realms. Where a substantive claim fails under an article of the Convention, Article 6(1) enables a claim to be pursued on procedural grounds.<sup>69</sup> In *Maaouia v. France*, however, the European Court of Human Rights (ECtHR or 'the Court'), responsible

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<sup>68</sup> *ibid* 116.

<sup>69</sup> Helen Fenwick, *Civil Liberties and Human Rights* (4th edn, Routledge-Cavendish, 2007) 60.

for deciding upon alleged breaches of the Convention by a signatory state, denied the applicability of Article 6 to immigration matters.<sup>70</sup> It held that the four-year delay in rescinding an exclusion order, which the appellant argued breached his rights because of the failure to grant him a fair hearing within a reasonable period of time, was neither a criminal matter nor a civil matter.<sup>71</sup> Protocol 7, Article 1 of the ECHR (which was signed on 11 May 1984 and entered into force on 1 November 1988), provides a right to a fair trial for lawfully resident foreigners facing expulsion, intending to fill a gap by creating a provision that had been previously absent. This absence was taken as proof by the Court to mean that Article 6 did not apply to ‘aliens’ facing deportation or removal from a host country, i.e., it was not applicable to immigration matters.

The Court in *Maaouia* relied on previous decisions of minor authority, rather than considering the matter afresh.<sup>72</sup> This resulted in the noteworthy dissenting judgments of Judges Loucaides and Traja, who argued that the history of Article 6 ECHR and Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention) had been poorly considered. Significantly, Article 31 of the Vienna Convention states that if a provision has the capacity for more than one interpretation, the decision-maker must decide in favour of the more expansive reading, i.e., that which grants an individual greater rights.<sup>73</sup>

Nonetheless, the ECtHR has also developed the right to a fair hearing in an important way, through the ‘equality of arms’ principle. In the case of *Dombo Beheer BV v. Netherlands*, the Court stated that each party had the right to present their case under conditions that did not place them at a disadvantage, thereby allowing applicants equal access to the records and documents relevant to a particular case.<sup>74</sup>

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<sup>70</sup> *Maaouia v. France* 33 EHRR 42 (2001).

<sup>71</sup> *ibid* [40].

<sup>72</sup> *ibid* [33-39].

<sup>73</sup> ‘Vienna Convention on the Law of Treaties’ (23 May 1969) United Nations, Treaty Series, vol. 1155, p.331, art 31.

<sup>74</sup> *Dombo Beheer BV v. Netherlands* App no 14448/88 [1993] [35].

Furthermore, despite the exclusion of applicability of Article 6 ECHR in the refugee context, other Convention provisions encumber signatory states to comply with the duty of fair treatment. For example, Article 5 ECHR protects the right to liberty and security, and engages fairness by providing the right for detention to be reviewed.<sup>75</sup> Through Article 5(4), detainees are empowered to use court proceedings to establish the legality of their detention. Even if a previous case, on similar facts, has established the lawfulness of detention, the deprivation of an opportunity for review could, nonetheless, violate the provision. Courts must conduct regular reviews of continuing detention and must have the capacity to test its lawfulness.<sup>76</sup> In *Chahal v. UK*, the Grand Chamber found that the options of habeas corpus, judicial review proceedings, and a panel were all inadequate to provide the degree of protection required to satisfy Article 5(4) (as well as being inadequate for the purposes of Article 13 ECHR, which addresses the right to an effective remedy in the domestic setting).<sup>77</sup>

Like the rule against bias, Article 14 ECHR prohibits the protection of Convention rights from being conducted in a discriminatory or prejudicial manner.

Article 13 ECHR also engages the duty to act fairly. Where a Convention right of an individual has been violated, Article 13 guarantees the right to an effective remedy before a national authority. Thus, Article 13 cannot be invoked independently from the freedoms explicitly articulated elsewhere in the Convention.<sup>78</sup> Additionally, Article 13 and Article 35(1) of Protocol No. 11 emphasise subsidiarity, simultaneously requiring the prior exhaustion of domestic remedies before approaching the ECtHR, and stressing the responsibility of the domestic court systems to safeguard fundamental rights.<sup>79</sup>

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<sup>75</sup> ECHR (n 24). Art 5(4) states, ‘everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful’.

<sup>76</sup> Fenwick (n 69) 58.

<sup>77</sup> *Chahal v. UK* App no. 22414/93 (15 November 1996) 23 ECHR 54 [130-132].

<sup>78</sup> Pieter Van Dijk et al., *Theory and Practice of the European Convention on Human Rights* (4th edn, Kluwer Law International, 2006) 998.

<sup>79</sup> *ibid* 998.



Moreover, Article 13 ECHR has been used in conjunction with Articles 2 and 3 ECHR (encompassing the right to life and the right not to be subjected to torture or inhumane and degrading treatment) to ensure that, where appropriate, the claims of asylum-seekers are covered by procedural and substantive protections. The scope of the obligations under Article 13 depends on the nature and seriousness of the interference with another Convention right (especially where Articles 2 and 3 are concerned). For example, given the non-derogability of Articles 2 and 3, the appraisal of whether a state has complied with the requirements under Article 13 should be stricter in relation to Articles 2 and 3 than in cases involving derogable rights.<sup>80</sup> Consequently, despite the non-applicability of Article 6 ECHR to asylum matters, the ECHR still constrains the Home Office's powers through its other provisions.

The way in which the above provisions engage the concept of fair treatment is illustrated by the following cases. The case of *Ipek v. Turkey* concerned the detention and disappearance of the applicant's two sons by the Turkish authorities.<sup>81</sup> The Court found that the Turkish authority had breached its duty to engage in an effective investigation, as provided for under Article 2.<sup>82</sup> The violations, consisting of the unacknowledged detention and disappearance (and presumed death) of the applicant's sons, engaged Articles 2, 3 and 5 of the ECHR, and were arguable for the purposes of Article 13. Consequently, there was a failure of the Turkish authorities to conduct an effective investigation into the violations, breaching Article 13.<sup>83</sup>

Furthermore, the case of *Ilhan v. Turkey* concerned the apprehension and physical abuse of the applicants by Turkish gendarmes.<sup>84</sup> Here, the ECtHR held that there had been violations of Article 3 and 13.<sup>85</sup> The Turkish investigatory authorities had not interviewed the applicants, witnesses, or doctors who provided medical treatment after the physical abuse, and did not scrutinise contradictory statements from the

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<sup>80</sup> *ibid* 1013.

<sup>81</sup> *Ipek v. Turkey* App no 25760/94 (17 February 2004) [10].

<sup>82</sup> *ibid* [169].

<sup>83</sup> *ibid* [197-200].

<sup>84</sup> *Ilhan v. Turkey* App no 22277/93 (27 June 2000).

<sup>85</sup> *ibid* [92-103].

gendarmes.<sup>86</sup> Consequently, the applicants were denied a ‘thorough and fair investigation’ into these allegations.<sup>87</sup> The case of *Mehmet Emin Yuksel* confirmed the approach of using Article 3 in conjunction with Article 13 to hold states accountable for the denial of procedural fairness, such as fair investigations.<sup>88</sup>

The ECtHR has also addressed fairness within asylum context, applying Article 3 to the consequences of return in the case of *NA v. United Kingdom*, and to the reception conditions of an Afghan asylum seeker in the case of *M.S.S. v. Belgium and Greece*.<sup>89</sup> Therefore, although asylum matters are not decided upon under Article 6 ECHR, the combination of Articles 2, 3 and 5 with Article 13 provides safeguards against violations of the right to fair treatment.

The European Social Charter (ESC) provides for economic and social rights,<sup>90</sup> some of which have been explicitly extended to asylum-seekers through the Appendix of the Charter, and the case-law of the European Committee of Social Rights (ECSR).<sup>91</sup> By way of example, Article 12(4) of the ESC obliges signatory states to ‘undertake a system of social security’, which should also be extended to asylum-seekers, and Article 13(1) encompasses the right to social and medical assistance. The case-law of the ECSR, derived from its complaints procedure, has also addressed the rights of asylum-seekers. For example, in the case of *Defence for Children International (DCI) v. Belgium*, the ECSR found that Belgium violated several rights of asylum-seeker children, as they were destitute and homeless, and deprived of medical care.<sup>92</sup> Similarly, in *Conference of European Churches (CEC) v. Netherlands*, the ECSR found that the Dutch welfare system violated Article 13(4) regarding medical assistance and Article 31(2) regarding the provision of housing, as adult asylum-

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<sup>86</sup> *ibid* [95].

<sup>87</sup> *ibid* [92-103].

<sup>88</sup> *Mehmet Emin Yuksel v. Turkey* App no 40154/98 (20 July 2004) [32].

<sup>89</sup> *NA v. United Kingdom* App no 25904/07 (17 July 2008) ECHR 616; *MSS v. Belgium and Greece* App no 30696/09 (21 January 2011).

<sup>90</sup> Council of Europe, European Social Charter (Revised), 3 May 1996, ETS 163.

<sup>91</sup> UNHCR and the Council of Europe’s Department of the European Social Charter, ‘Round Table on the Social Rights of Refugees, Asylum-Seekers and Internally Displaced Persons: A Comparative Perspective’ (Council of Europe, 7 December 2009) 7.

<sup>92</sup> *Defence for Children International (DCI) v. Belgium - decision on the merits*, Complaint No. 69/2011, Council of Europe: European Committee of Social Rights, 23 October 2012.

seekers were deprived of medical assistance and accommodation.<sup>93</sup> Such rights are supremely important to the dignity of asylum-seekers, as well as their experience of a particular asylum system.

Since the Treaty of Amsterdam in 1997 (entered into force in 1999), the EU has declared its intention to create a ‘Common European Asylum System’ (CEAS).<sup>94</sup> Essentially, the objectives of the CEAS are to create common standards of protection across Member States, and increased cooperation, support and solidarity between Member States of the EU on asylum issues.<sup>95</sup> Thus, the CEAS aims to stem the proliferation of divergent asylum standards across EU Member States and, in advancing common, minimum standards, allows for domestic immigration authorities to enact standards of a higher quality, surpassing the standards provided by the EU asylum instruments. As stated on the European Commission website, ‘asylum should not be a lottery’.<sup>96</sup> EU Member States must work together to ensure that asylum-seekers are treated fairly and their claims are treated uniformly across the region. Therefore, the CEAS aims to prevent the ‘secondary movements’ of asylum claimants between Member States due to different legal frameworks and asylum standards.<sup>97</sup> As a result, four main legislative instruments have been implemented to create EU-wide common standards on issues pertaining to asylum.<sup>98</sup> These asylum instruments are colloquially known as the ‘Reception Directive’, ‘Procedures Directive’,

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<sup>93</sup> *Conference of European Churches (CEC) v. The Netherlands (complaint)*, Complaint No 90/2013, Council of Europe: European Committee of Social Rights, 21 January 2013.

<sup>94</sup> Treaty of Amsterdam, reflected in TFEU (n 25) arts 67-80.

<sup>95</sup> European Commission, Migration and Home Affairs, ‘Policies – Asylum’ <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm)> accessed 16 June 2016.

<sup>96</sup> *ibid.*

<sup>97</sup> ‘Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted’ (Qualification Directive) (30 September 2004), OJ L. 304/12-304/23, recital 7.

<sup>98</sup> The researcher acknowledges that there are other Directives that are part of the EU asylum acquis, such as ‘Council Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for Returning Illegally Staying Third-Country Nationals’ (16 December 2008) OJ L. 348/98 (Return Directive) and Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification’ (22 September 2003) OJ L.251 (Family Reunification Directive), although the Family Reunification Directive does not apply to the UK.

‘Qualification Directive’, and ‘Dublin Regulations’.<sup>99</sup> Although the UK ‘opted-in’ and adopted the first phase of legislation, it decided to ‘opt-out’ of most of the second phase. As a result, it was not a party to the recasting of the three directives, but chose to remain a party to the recast Dublin Regulations. So, only the first phase of the Reception, Procedures and Qualification Directives apply to the British asylum system, as the UK believed that adopting a common EU asylum policy would not be ‘right’ for it.<sup>100</sup> Arguably, the implications of the UK not opting into these recast directives is that it has resisted strengthening the legal standards on certain issues, such as the employment rights of asylum-seekers and their subjection to detention and fast-track procedures, in order to preserve autonomy for the state.<sup>101</sup> The discussion below will thus concentrate on the CEAS’s first phase of legislation.

The CEAS goals are relevant for the purposes of achieving a fair system, besides constituting political tools that aim to regulate the relationship between Member States and their obligation in the asylum context.<sup>102</sup> For example, Council Directive 2005/85/EC, the ‘Procedures Directive’, fulfils a key EU objective that emerged in the Tampere Conclusions (‘to introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status’).<sup>103</sup> Council Directive 2004/83/EC, the ‘Qualification Directive’, sets out the standards for the qualification

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<sup>99</sup> The recast (amended) instruments are currently: ‘Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast)’ (20 December 2011) OJ L. 337/9-337/26; ‘Council Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)’ (29 June 2013) OJ L. 180/60 -180/95; ‘Council Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 Laying Down Standards for the Reception of Applicants for International Protection (Recast)’ (29 June 2013) OJ L. 180/96 -105/32; ‘Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Application for International Protection Lodged in One of the Member States by a Third-Country National or a Stateless Person (Recast)’ (29 June 2013) OJ L. 180/31-180/59.

<sup>100</sup> Cathryn Costello and Emily Hancox, ‘Policy Primer: The UK, the Common European Asylum System and EU Immigration Law’ (*Migration Observatory at the University of Oxford*, 2 May 2014) 4.

<sup>101</sup> *ibid.*

<sup>102</sup> European Commission, ‘Green Paper of 6 June 2007 on the Future Common European Asylum System’ COM (2007) 301.

<sup>103</sup> ‘Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status’ (Procedures Directive) (2 January 2006) OJ L 326, recital 5 and art 1.

of refugee status.<sup>104</sup> These two directives address the procedural and substantive components of fairness set out in administrative law. For example, Article 9 of the Procedures Directive states that a determining authority must communicate asylum decisions in writing. In negative decisions, it must provide the reasons and the details of how it can be challenged. This corresponds to the right to notice and right to receive reasons under procedural fairness. Furthermore, Article 9 of the Qualification Directive addresses substantive fairness, as it gives details and examples of what will constitute an ‘act of persecution’ for the purposes of a successful asylum claim.

In addition to the CEAS directives, the EU Charter makes individual rights visible and explicit across the Union.<sup>105</sup> It also enables a breach of these rights to be challenged at the Court of Justice of the European Union (CJEU), such as matters of interpretation pertaining to provisions of the asylum directives. On 1 December 2009, the Treaty of Lisbon came into force, giving the Charter binding effect on all EU institutions and Member State governments.<sup>106</sup>

Article 10 of the Charter guarantees freedom of thought and conscience. Similarly, Article 18 secures the right to asylum. Moreover, although Article 6 ECHR is held to be inapplicable to asylum cases, rights to the exact same standard are, nonetheless, secured via the EU, through the Charter. Article 41(1) of the EU Charter affords the right to have one’s matters handled by a fair procedure, ‘impartially, fairly and within a reasonable time’.<sup>107</sup> Article 41(2) includes the right to be heard before a decision is made, the right of access to one’s file, and the right to receive reasons for a decision taken by the authority, reinforcing certain rights within administrative law. Additionally, Article 47 of the Charter provides two further rights: the right to an effective remedy before a tribunal and the right to a fair and public hearing before an independent and impartial tribunal, within a reasonable amount of time. Article 52(3) provides for the scope of the Charter. Although several provisions in the Charter are

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<sup>104</sup> Qualification Directive (n 97).

<sup>105</sup> ‘Charter of Fundamental Rights of the European Union’ (EU Charter) (26 October 2012) 2012/C 326/02.

<sup>106</sup> ‘Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community’ (13 December 2007) 2007/C 306/01.

<sup>107</sup> EU Charter (n 105) art 41(1).

intended to mirror those in the ECHR, this does ‘not prevent Union law providing more extensive protection’ – for example, in extending the right to fair trial to the asylum context.

Indeed, the ability to provide greater protection to individuals within the EU jurisdiction was explicitly highlighted by the ‘Explanations Relating to the Charter of Fundamental Rights’ (the ‘Explanations’).<sup>108</sup> This is a document designed to assist with interpreting the provisions of the Charter. For example, on Article 47(1), the Explanations acknowledge the parallels with Article 13 ECHR, but then state that ‘in Union law the protection is more extensive since it guarantees the right to an effective remedy before a court’.<sup>109</sup> Additionally, the Explanation acknowledge that, although Article 47(2) of the Charter corresponds to Article 6(1) ECHR, ‘in Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations...nevertheless, in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union’.<sup>110</sup> This is underscored at the very end, putting Article 47(2) and (3) in a list of Articles ‘where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider.’<sup>111</sup>

Therefore, despite *Maaouia* excluding the applicability of Article 6 ECHR to asylum matters, the substance of Article 6 ECHR standards enters the British asylum system through the EU Charter, whenever the UK is acting within the scope of EU law.<sup>112</sup> The EU Charter binds Member States not only when implementing EU law, but also in relation to any activities that fall within the scope of EU law.<sup>113</sup> Therefore, given an asylum competence is found within the treaties (beginning with the Treaty of Amsterdam), the Charter binds Member States whenever they act within the field of asylum.

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<sup>108</sup> European Parliament, ‘Explanations Relating to the Charter of Fundamental Rights of the European Union’ (14 December 2007) (2007/C 303/02).

<sup>109</sup> *ibid*, explanation on Article 47.

<sup>110</sup> *ibid*; Case 294/83 *Les Verts v. European Parliament* [1986] ECR 1339.

<sup>111</sup> *ibid* ‘Explanations Relating to Charter’.

<sup>112</sup> EU Charter (n 105) art 51(1).

<sup>113</sup> Case C-256/11 *Dereci* [2011] ECR I-11315 [72].

These rights are reinforced by the jurisdiction of the CJEU in the field of asylum and its competence in providing guidance on the interpretation of EU legislation. In the case of *Salahaddin Abdulla and Others v. Germany*, the CJEU emphasised that, when making a determination on the risk of persecution, decision-makers must operate ‘with vigilance, and care, since what are at issue are issues relating to the integrity of the person and to individual liberties, issues which relate to the fundamental values of the Union’.<sup>114</sup> The case-law of the CJEU has addressed, specifically, the fair and proper consideration of asylum claims based on sexual identity grounds, which will be discussed within the subsequent chapters.

Through this section it has become clear that fairness is the appropriate standard for this thesis. It has a sound theoretical basis in legal philosophy and is an accepted standard in the jurisdictions where the British asylum system operates. UK administrative law, EU law and international human rights law have not only proven the relevance of fairness, but have also provided fairness with tangible elements. These add substance to the fairness standard and entrench the Home Office’s duty to act fairly in real legal provisions and principles. Relying on the existence of this theoretical and legal foundation of fairness within UK law, the following section advances the ‘structural principles’ of a fair asylum system. Building upon the epithets and laws advanced by UK administrative law and by international and supranational obligations (Appendix B), the ‘structural principles’ provide clarity and substance as to how an asylum system can exercise its duty to determine LGB asylum claims fairly.

### 3. What Does Fairness Look Like in the LGB Asylum Context: the ‘Structural Principles’

Having outlined the theoretical and legal foundation of the public authorities’ duty to act fairly in the exercise of its decision-making powers, the third section of this theoretical framework chapter sets out the terms of the fairness obligation in the

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<sup>114</sup> Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahaddin Abdulla and Others v. Germany* [2010] ECR I-1493 [90].

context of asylum claims made on grounds of the applicant's sexual identity. It is clear that acting fairly when deciding asylum claims is an integral responsibility of all decision-makers involved in the British asylum system. The United Nations High Commissioner for Refugees (UNHCR) has stated that the 'importance of [refugee status determination] procedures cannot be overemphasized.... A wrong decision might cost the person's life or liberty'.<sup>115</sup> It is also important to re-emphasise why fair treatment is essential in the area of asylum. The standards created by the fairness obligation act as protections against the incidence of arbitrary or incorrect rejections of genuine asylum claims.<sup>116</sup> This is fundamental given that the essential liberties (and lives) are at stake for most asylum-seekers. Furthermore, returning to the administrative law guidance on when higher standards of fairness are appropriate, this thesis contends that a fairer asylum system will result in a more economically efficient system, an essential advantage in an era of increasingly 'scarce resources'.<sup>117</sup>

The structural principles set out in this section will elucidate the basic components of a fair asylum system, i.e., the necessary values for the claims of LGB asylum-seekers to be treated fairly. The principles are grounded in the theoretical and legal foundation of fairness entrenched within UK law.<sup>118</sup> They build upon the provisions discussed above to provide clarity and substance to the basic attributes of a fair asylum system. These principles serve an additional purpose, however. They also act as a basic analytical framework that, associated with the key concepts of intersectionality and sexual diversity, will be used in the investigation of the British asylum system for sexual identity-based asylum claims. The investigation follows in the subsequent chapters (Chapters three and four).

The principles advanced in this section are arranged under two main themes that have been extracted from the above exploration of section 2. The first theme addresses substantive fairness, in terms of matters that impact upon a person's interest in the

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<sup>115</sup> UNHCR, 'Determination of Refugee Status' (1989) RLD 2, Chapter 2.

<sup>116</sup> Galligan (n 1) 54-56.

<sup>117</sup> European Council of Refugees and Exiles (ECRE), 'The Way Forward: Towards Fair and Efficient Asylum Systems in Europe' (September 2005) 48.

<sup>118</sup> Note that domestic UK law on asylum is primarily contained in the Immigration Rules (last amended July 2008) HC 293, paras 326A-325H.



outcome of a process, i.e. the decision whether to grant refugee status. This theme advances principles that relate to the relationship between fairness and the fundamental rights of asylum-seekers, as explored through Dworkin in section 2.1, as this is what is required to effect substantive fairness in the refugee context by facilitating a fairly constituted outcome. The second theme concerns procedural fairness, in terms of matters that affect the person's participation in a process, i.e. the process of claiming asylum. This second theme transposes key epithets of procedural fairness outlined above into the asylum context. The two themes are flexibly arranged and intersect frequently in this thesis. The overarching purpose of these two themes is to fulfil the right of genuine (LGB) asylum-seekers to be granted refugee protection.

### **3.1 The Relationship Between Fairness and the Rights of Asylum-Seekers**

The first theme in the framework of structural principles addresses how the fair treatment of asylum-seekers encompasses the protection of their fundamental rights, as articulated by the Refugee Convention and the international and supranational instruments described above. This was briefly addressed in section 2.1, where it was discussed that Dworkin found that fairness requires decision-makers to avoid 'majoritarianism' by safeguarding the rights of minorities. The relationship between fairness and rights was also articulated by the ECHR, which uses principles of fairness to protect the fundamental rights of individuals. In addressing this relationship further, this theme espouses concrete principles regarding the fundamental rights of asylum-seekers and the respect owed to them by asylum-receiving states, the inherently flexible and evolving understanding of the concepts contained in the Refugee Convention, and finally, how the evidentiary standards of the refugee regime must function to achieve substantive fairness.

#### *3.1.1. Respect for UK's Broader Fundamental Rights Obligations in Asylum Decision-Making*

The first component of the structural principles addresses a basic criterion for any fair asylum system. An asylum-receiving state must respect and protect the fundamental rights of asylum-seekers, despite their lack of citizenship within that particular state. It is a facet of the international human rights regime that, whilst the state-citizen relationship enjoys certain privileges and respect, possession of inviolable

fundamental rights is not predicated on one's immigration status, but on one's core dignity.<sup>119</sup> This has been demonstrated in section 2, for example, by the ECtHR's willingness to protect the fundamental rights of asylum-seekers against breaches by asylum-receiving states. Indeed, as explained previously, fundamental rights are essential to the protection of human dignity and the preservation of life, which inspired the international human rights regime. The inviolable nature of dignity, as Dworkin discussed, provides the basis on which states must protect the fundamental rights of all individuals within their jurisdiction or control. The principles of dignity, equality and mutual respect (section 2.1), dictate that asylum systems are also obliged to protect the fundamental rights of asylum-seekers in order to operate fairly. Returning to the earlier contention that fairness is entrenched within UK law, recital 10 in the preamble to the Qualification Directive emphasises that the Directive respects the fundamental rights espoused by the EU Charter. EU Member States are also bound by this obligation.

As the Refugee Convention and human rights instruments like the ECHR are both concerned with human dignity, there is cause to argue that the refugee protection regime is part of the human rights arena of international law.<sup>120</sup> Weis contended that the impact of human rights on the refugee regime was to 'considerably' expand the 'ambit of protection afforded to persons generally'.<sup>121</sup> For the reason of their interconnection, it is entirely reasonable to expect asylum systems to respect the basic rights of asylum-seekers.

The language of the Refugee Convention's preamble demonstrates the document's human rights character. This not only sets out the right for humans to enjoy, without discrimination, their fundamental rights and freedoms, as set out in the UDHR, but also emphasises their widest possible applicability.<sup>122</sup> Weis states that the preamble

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<sup>119</sup> UN General Assembly, 'Universal Declaration of Human Rights' (10 December 1948) 217 A (III), preamble.

<sup>120</sup> Tom Clark in cooperation with Francois Crépeau, 'Mainstreaming Refugee Rights. The Refugee Convention and International Human Rights Law' (1999) 17 *Netherlands Quarterly of Human Rights* 389.

<sup>121</sup> UNHCR, 'The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis' (1990) 8-12.

<sup>122</sup> 'Convention Relating to the Status of Refugees' (Refugee Convention) (Adopted 28 July 1951, Entered into Force 22 April 1954) 189 UNTS 137, preamble.

gives expression to the goals of the Refugee Convention and underscores that refugees are entitled to the same fundamental rights and freedoms set out for all humanity.<sup>123</sup> After all, as stated in Article 14 ECHR, there can be no discrimination in protecting one's fundamental rights. The reality is, however, that the ECtHR applies a lower standard of protection for asylum-seekers. This is demonstrated by its ruling on Article 6 (s.2.2.2).<sup>124</sup> Despite this, the ECtHR has also affirmed the right of asylum-seekers to be fairly treated (s.2.2.2). Moreover, Article 21 of the EU Charter, for example, also safeguards the right to non-discriminatory treatment, with the potential for protection that is more expansive in scope.

The substantial responsibilities of EU asylum-receiving jurisdictions in relation to protecting the fundamental rights of claimants seeking refuge further elucidate this relationship. Council Directive 2003/9/EC (Reception Directive) limits the power bestowed upon asylum-determining authorities by outlining their minimum obligations in relation to food, accommodation, clothing, financial allowances, medical and psychological care, and family unity, for example.<sup>125</sup> Furthermore, it reinforces the role of the EU Charter and of Member States' existing international obligations in giving effect to the terms of the Refugee Convention.<sup>126</sup> Therefore, it is essential to the fair operation of an asylum system that the public authority concerned, such as the Home Office, which is responsible for first-instance determinations under the British asylum system, respects and gives effect to the fundamental rights of asylum-seekers during the RSD process.

In the LGB context, the obligation upon asylum decision-makers to give effect to the human rights obligations of asylum-seekers is extremely important. The UK is in a paradoxical position. In the 'Rainbow Index', an annual report in which the legal situation for LGBT individuals across European countries is appraised and ranked, the UK was placed at the top with 86%, as the country with the most advanced legal

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<sup>123</sup> Weis (n 121) 32.

<sup>124</sup> Nuala Mole and Catherine Meredith, 'Asylum and the European Convention on Human Rights' Human Rights Files, No. 9 (*Council of Europe*, 15 December 2011).

<sup>125</sup> 'Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States' (Reception Directive) (6 February 2003), OJ L. 31/18-31/25.

<sup>126</sup> *ibid* recitals 6-7.

system for sexual minorities.<sup>127</sup> Yet, this ranking contrasts starkly with the academic research and media reporting identifying the British asylum system's prejudicial treatment of LGB asylum-seekers, violating their fundamental rights. Millbank, for example, has previously described the UK's 'hostile' approach to LGB asylum claims.<sup>128</sup>

Given the relatively recent advent of sexual minority rights, it may prove a difficult task for asylum systems to accommodate these rights and understand how they should be given effect within the asylum context. It is for such reasons that this thesis is underpinned by sexual diversity and intersectionality, so that the asylum systems are provided with tangible touchstones on fair asylum decision-making.

To provide guidance on how human rights law applies with regard to the rights of sexual and gender minorities, international human rights experts constructed the Yogyakarta Principles.<sup>129</sup> The principles were developed in 2006, in response to the documented abuse of sexual and gender minorities in many countries around the world. The Principles apply existing international human rights principles to the context of sexual orientation and gender identity. They do not by themselves have binding effect. Given the 'inconsistent and fragmented' approaches that preceded the Yogyakarta Principles, they provide clarification on the appropriate standards of human rights law in the LGB context and facilitate the consistent application of those standards.<sup>130</sup> Asylum systems can ensure the fulfillment of their fundamental rights obligations by referring back to, and making decisions in accordance with, the Yogyakarta Principles.

By way of example, Principle 4 of the Yogyakarta Principles engages with substantive fairness by articulating the right to life in the sexual identity context. It

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<sup>127</sup> ILGA-Europe, 'Leadership: the key to unlocking LGBTI equality in Europe' (10 May 2015) <<http://www.ilga-europe.org/resources/rainbow-europe/2015>> accessed 16 July 2015. It has since moved to second place, behind Malta. See ILGA-Europe, 'Rainbow Index' <<http://www.rainbow-europe.org/country-ranking>> accessed 22 February 2016.

<sup>128</sup> Jenni Millbank, 'A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989–2003' (2005) 14(1) *Social & Legal Studies* 115–138, 116.

<sup>129</sup> International Commission of Jurists (ICJ), 'Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (March 2007).

<sup>130</sup> *ibid* introduction and preamble.

states that ‘no one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity’.<sup>131</sup> This principle provides greater instruction on how states can observe these rights, for example, by repealing ‘all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent’.<sup>132</sup>

This chapter turns to another structural principle. This principle ties into the role of human rights in widening the protection provided by the refugee regime, as it relates to the scope of the Refugee Convention.

### *3.1.2. Embracing the Refugee Convention as a ‘Living’ Document, and Interpreting its Provisions in a Pragmatic and Dynamic Way*

In recognition of the circumstances motivating the creation of the Convention, its inherent purpose, and the intentions of the Convention drafters, the structural principles assert that the treaty must be understood as a ‘living’ document. This means that the terms of the treaty must be interpreted and applied with pragmatism and flexibility. The RSD must be conducted to enable the Convention to provide protection to all individuals genuinely fleeing persecution in their home societies. This is regardless of whether the reasons for the mistreatment or the tools of their abuse were envisaged by Convention drafters or articulated in the Convention itself. The interpretation and understanding of the Refugee Convention within fair asylum systems must develop in line with the evolution of global societies, allowing for the emergence of refugee categories that were not envisaged by the Convention drafters.<sup>133</sup> This dynamic and evolving approach to the interpretation of the Convention is essential to the continued relevance of the Refugee Convention and the refugee protection regime in all asylum-receiving states. It is fundamental to the ability of an asylum system to protect those who deserve the protection that the

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<sup>131</sup> *ibid* principle 4.

<sup>132</sup> *ibid* principle 4(a).

<sup>133</sup> *R v. Secretary of State for the Home Department, Ex Parte Adan* [2001] 2 AC 277 (CA and HL) [500G-H] (Laws LJ in the CA): ‘It is clear that the signatory states intended that the [Refugee] Convention should afford continuing protection for refugees in the changing circumstances of the present and future world... the [Refugee Convention] has to be regarded as a living instrument: just as, by the Strasbourg jurisprudence, the [ECHR] is so regarded.’

Convention aims to provide, but whose circumstances and identities have not been expressly included within the language of the treaty provisions.

The guidance available on the interpretation of the Convention recognises that the Convention is a “living” document. Returning to Article 31 of the Vienna Convention, it is clear that the Convention must be interpreted ‘in light of its object and purpose’.<sup>134</sup> The object and purpose of the Convention are to be found in the preamble. These include the goal of extending ‘the scope of and protection accorded by such instruments [the Charter of the United Nations and the UDHR] by means of a new agreement’, whereby the Refugee Convention represents this agreement.<sup>135</sup> The UNHCR Handbook on the determination of refugee status describes another objective as assuring those fleeing persecution ‘the widest possible exercise of their fundamental rights and freedoms’.<sup>136</sup> The expansive scope of the Convention was identified within the *travaux préparatoires* (the official record of the drafting process of the Refugee Convention). For example, during the drafting process, the French representative argued that the preamble would enable the ‘refugee problem’ to be ‘expanded to its true dimensions’.<sup>137</sup> Doing so was especially important, in the light of the Convention representing a compromise between doing what was ‘ideal’ and what was ‘practicable’.<sup>138</sup> Hence, the Conference which adopted the Convention shared a ‘hope’ that:

[T]he Convention would have value as an example exceeding its contractual scope that all nations would be guided by it in granting as far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention the treatment for which it provides.<sup>139</sup>

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<sup>134</sup> Vienna Convention (n 73) art 3.

<sup>135</sup> Refugee Convention (n 122) preamble.

<sup>136</sup> UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (December 2011) HCR/1P/4/ENG/REV, forward.

<sup>137</sup> Weis (n 121) 15; ECOSOC Social Committee, 158<sup>th</sup> Meeting, UN Doc. E/AC.7.158 (1950).

<sup>138</sup> *ibid.*

<sup>139</sup> ECOSOC, UN Doc. E/L.81 (1950), Recommendation E.

The spirit of the Refugee Convention as a forward-looking document, seeking to evolve through interpretation in response to the changing needs of global societies, is explicit in the historical development of this treaty. As the Convention was specifically instituted in response to the events of the Second World War, the recognition that refugees were being created in alternate situations and geographic regions led to the UN Refugee Protocol 1967.<sup>140</sup> The Protocol removed the restrictions on the eligibility for protection, which were grounded on a particular geographical area and timeframe, allowing any person to seek asylum.<sup>141</sup> Accordingly, the application of the 1967 Protocol to the remit of the Convention's protection has enabled the refugee protection regime to exist as we currently recognise it.

Further, within the terms of the Convention, there are several concepts that were deliberately undefined by the drafters, permitting academics, the UNHCR, and Judiciary members across asylum-receiving jurisdictions to grapple with how those terms should be defined.<sup>142</sup> During this process of defining and interpreting these concepts, the need to interpret these terms innovatively has been continually emphasised.<sup>143</sup> This allows for the Convention to encompass the diverse, changing and increasingly complex experiences of refugees in evolving contemporary societies. This is discussed further in Chapters three and four.

On several occasions the British Judiciary has emphasised that the Refugee Convention is a 'living' instrument. The House of Lords (now UK Supreme Court), for example, has asserted that:

[T]he best guide is to be found in the evolutionary approach that ought to be taken to international humanitarian agreements. It has long been recognised that human rights treaties have a special character... Their object is to protect

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<sup>140</sup> 'Protocol Relating to the Status of Refugees' (Adopted 31 January 1967, Entered into Force 4 October 1967) 606 UNTS 267.

<sup>141</sup> *ibid* art 2.

<sup>142</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP, 2007) 94.

<sup>143</sup> *Ram v. Minister for Immigration and Ethnic Affairs* [1995] 57 FCR 565 (Australia), cited by Gummow J in the High Court of Australia in *Applicant A v. Minister for Immigration and Ethnic Affairs* [1997] 4 LRC 480 (Australia) at [533-534].

the rights and freedoms of individual human beings, generally or falling within a particular description...<sup>144</sup>

Furthermore, this characterisation of the Refugee Convention has influenced the interpretation of Article 1F of the Convention, as acknowledged by Judge Storey in the case of *Gurung*:

[I]t is particularly salient to recall the well-settled principle that the Refugee Convention is a living instrument whose interpretation requires a dynamic approach which bears in mind the objects and purposes set out in its Preamble, so as to ensure that it gives a contemporary response to contemporary realities.<sup>145</sup>

The dynamic interpretation of the Refugee Convention as a ‘living’ instrument arguably reflects the pragmatism of procedural and substantive fairness, whose detail alters depending on the circumstances presented. Similarly, the interpretation of the Refugee Convention must also evolve depending on the familiarity of the circumstances that it is presented with. Indeed, it is due to the evolving nature of refugee law that many asylum systems, including the British asylum system, eventually recognised that sexual minorities are potential subjects of refugee protection claims.<sup>146</sup>

A restrictive approach to the interpretation of the purpose and terms of the Convention results in new refugee categories being denied recognition as potential beneficiaries of refugee status. It also actively denies protection altogether to potentially deserving applicants. Accordingly, to adhere to substantive fairness (and the respect for human dignity, as argued by Dworkin), the asylum system cannot adopt an inflexible interpretation of the instrument from which rights to protection are granted. Such an approach will result in asylum systems being unable to protect genuine refugees.

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<sup>144</sup> *R v. Asfaw* [2008] UKHL 31 [54].

<sup>145</sup> *Gurung (Exclusion, Risk, Maoists) Nepal CG* [2002] UKIAT 04870 [35].

<sup>146</sup> Millbank, ‘Preoccupation with Perversion’ (n 128) 118.



Similarly, although sexual identity has been recognised as a category capable of protection, many LGB claimants could also be wrongfully denied protection through archaic interpretations of the Refugee Convention. The experiences forming LGB asylum narratives are unique and complex, compounded by the factors of intersectionality and sexual diversity (as outlined in the introductory chapter).<sup>147</sup> A dynamic approach to interpreting the Refugee Convention is especially fundamental to the proper determination of sexual identity-based asylum claims, as the theoretical and societal understandings of sexual identity lack definitive conclusions.<sup>148</sup> The potential for restrictive understandings of the Convention, representing a failure of substantive fairness, is even more acute in the sexual identity context, as the instrument was not drafted with the inclusion of LGB people in mind.<sup>149</sup> Thus, inclusive approaches are necessary, otherwise LGB experiences are vulnerable to being excluded and having their claims denied. Substantive fairness, in the asylum context is achieved by acknowledging that first and foremost the Convention is a ‘living’ document.

Explaining how the ‘living’ status of the Refugee Convention would operate in the LGB asylum context is important. For example, within the RSD, where the agents of persecution do not belong to the machinery of the state, decision-makers are tasked with evaluating whether protection from the state was available.<sup>150</sup> Claimants are required to explain why they are not able to access protection in their home country. This is because the Refugee Convention only provides surrogate protection where a state has failed to discharge its own duties to protect its citizenship.

Seeking state protection, however, is extremely complex from the LGB perspective. Sexual minorities rarely have equal access to the protection mechanisms of a given state due to their subjugated status in many societies, reflected by a culture of

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<sup>147</sup> Monica Saxena, ‘More Than Mere Semantics: The Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims’ (2005-2006) 12 Mich. J. Gender & L. 331, 331.

<sup>148</sup> Michele J. Eliason, ‘Identity Formation for Lesbian, Bisexual, and Gay Persons: Beyond a “Minoritizing” View’ (1996) 30(3) Journal of Homosexuality 31.

<sup>149</sup> *Applicant A v. Minister for Immigration and Ethnic Affairs* (n 143) [541] (Kirby J) (Australia).

<sup>150</sup> UNHCR Handbook (n 136) paras 97–101.

homophobia in a state's legal system and its agencies.<sup>151</sup> For example, where a state establishes criminal sanctions against same-sex sexual acts, a fair asylum system cannot expect a claimant to have sought protection against non-state persecution before seeking refuge abroad.<sup>152</sup> Moreover, psychological barriers often prevent claimants from seeking protection against non-state agents such as one's family. This is more often than not aggravated by a willingness on the part of state authorities to overlook honour-based violence by the family or members of the public against the LGB community.<sup>153</sup> Therefore, a fair system would interpret the Refugee Convention pragmatically, taking into consideration that in these circumstances, LGB asylum-seekers are generally unable to prove (or will find it difficult to prove) that they sought state protection. If they tried to seek state protection, it would either be denied or insufficient. It is much more likely, however, that an LGB asylum seeker would never have sought the protection of the state, because this would render the individual a target of the state's homophobic laws. This is also tied to the next component of the structural principles.

### *3.1.3. Applying the Evidentiary Thresholds of the Refugee Definition Pragmatically and Flexibly*

The third structural principle of the first theme builds upon the two previous principles. Fair treatment is contingent on the recognition and protection of the fundamental rights of asylum-seekers and the interpretation of the Refugee Convention in line with its status as an evolving document. Under the British asylum system, the overall test for determining asylum claims is articulated as whether there is a 'reasonable degree of likelihood' for believing that the applicant will be persecuted if returned to one's home society.<sup>154</sup> This overall test is made of a series of composite tests or threshold questions that need to be determined during the course of assessing a claim for asylum. The first test or question decision-makers need to address when deciding whether to grant an asylum-seeker refugee protection, is

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<sup>151</sup> Nicole LaViolette, "UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity": a Critical Commentary' (2010) 22(2) International Journal of Refugee Law 173-208, 197-198.

<sup>152</sup> *ibid.*

<sup>153</sup> *ibid.*

<sup>154</sup> *R v. Secretary of State for the Home Department, Ex Parte Sivakumaran* [1988] AC 958 [994].

whether they meet the requirements of the refugee definition in Article 1 of the Convention.<sup>155</sup> Article 1 states that applicants must hold a ‘well-founded fear of persecution’ on the basis of a Convention ground or membership of a particular social group. Accordingly the definition of refugee is said to encompass two important tests: first, on whether the thresholds of ‘persecution’ have been met, and secondly, in the LGB context, whether an application can demonstrate their membership of a ‘particular social group’.

The principle of applying the evidentiary thresholds pragmatically constitutes a core component of substantive fairness. As highlighted by Article 8(2)(c) of the Procedures Directive, decision-makers should have the relevant knowledge ‘with respect to relevant standards applicable in the field of asylum and refugee law’.<sup>156</sup> Without this knowledge, substantive fairness in relation to the evidentiary standards cannot be upheld. The evidentiary thresholds of the RSD should adhere to the aforementioned principles of substantive fairness, namely the dynamic interpretation of the Refugee Convention and respect of asylum-seekers’ fundamental rights. The RSD must be intersectional, and in the LGB context, must understand sufficiently how sexual identity engages fundamental human rights and the developing understanding of sexual identity itself. Without doing so, a fair asylum system cannot guarantee that the process will be fair in substance, i.e., result in the correct outcome. In the asylum system, the only correct decision for LGB asylum-seekers is that which will not injure their interest, as their interest is primarily in securing their safety. Further substance is given to this principle by examining the evidentiary thresholds that make up the RSD.

#### i. Applying the Thresholds of Persecution

Under the first clause of the refugee definition, asylum-seekers claiming refugee protection must convince decision-makers that the harm suffered and/or feared, if returned to one’s country of origin, constitutes persecution.<sup>157</sup> The concept of persecution, however, was not defined in the Refugee Convention. As a result, it was

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<sup>155</sup> Refugee Convention (n 122) art 1.

<sup>156</sup> Procedures Directive (n 103) art 8(2)(c).

<sup>157</sup> *ibid.*

unclear from the outset of the refugee protection regime what would constitute persecution.

The Convention's failure to define the meaning of persecution was deliberate, highlighted by the UNHCR's re-emphasis of the subjective nature of what would constitute persecution.<sup>158</sup> The UNHCR was reluctant to even provide a general guideline, finding it impossible 'to lay-down a general rule as to what cumulative reasons can give rise to a valid claim'.<sup>159</sup> This reluctance was motivated by the desire to shun narrow interpretations and applications of the thresholds. In *Gashi (Asylum; Persecution) Kosovo*, the tribunal warned that defining persecution could limit its dynamism and pragmatism.<sup>160</sup> It cited the UNHCR submission that 'for the Convention to be a living instrument of protection, the term "persecution" must be interpreted in a manner that best achieves its humanitarian object and purpose'.<sup>161</sup> Weis agreed with the tribunal's opinion, arguing that limited approaches to the definition of persecution led to restrictions of the refugee regime itself, threatening 'the humanitarian spirit of the Convention'.<sup>162</sup>

Despite the opinion in *Gashi*, there is academic and other non-binding guidance developed to assist with determining whether the thresholds have been met in an asylum claim. Persecution has been defined as 'the sustained or systemic violation of basic human rights resulting from a failure of State protection'.<sup>163</sup> The conception of persecution as serious ill-treatment which violates human rights law is reflected in Article 9 of the Qualification Directive, incorporated into UK law by Regulation 5(1) of the Refugee or Person in Need of International Protection (Qualification) Regulations 2006.<sup>164</sup> To meet the thresholds of persecution, acts must be 'sufficiently serious by their nature or repetition' so as to constitute 'a severe violation of basic

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<sup>158</sup> UNHCR Handbook (n 136) 51-52.

<sup>159</sup> *ibid* 53.

<sup>160</sup> *Gashi (Asylum; Persecution) Kosovo* [1996] UKIAT 13695.

<sup>161</sup> *ibid*.

<sup>162</sup> Weis (n 121) 8.

<sup>163</sup> James C. Hathaway, *The Law of Refugee Status* (Butterworths, 1991) 101.

<sup>164</sup> 'Refugee or Persons in Need of International Protection (Qualification) Regulations 2006', No. 2525, reg 5(1).

human rights', especially those considered non-derogable under human rights law.<sup>165</sup> Additionally, in line with the belief that, whilst persecution itself cannot be defined, acts of persecution can be identified, Article 9(2) of the Directive provides a non-exhaustive list of acts considered persecutory.<sup>166</sup> The flexibility of this definition has allowed persecution to be identified on a case-by-case basis.

In the LGB context, however, it is essential for two key reasons to apply the identified thresholds of persecution with the aforementioned flexibility. The first is the way in which the abuses experienced by sexual minorities engage the evolving and open spirit of the Refugee Convention. The second concerns the way in which the often distinctive nature of this persecution engages their fundamental rights. Within asylum claims, substantive fairness has facilitated the recognition that discrimination could also constitute persecution, as it may 'lead to consequences of a substantially prejudicial nature for the persons concerned'.<sup>167</sup> Although the mistreatment experienced may not be serious enough to meet the general understanding of persecution, fairness in substance allows claimants to obtain refugee protection on the basis of discriminatory treatment that, cumulatively, meets the thresholds of persecution.<sup>168</sup>

It is also a matter of substantive fairness for decision-makers to grasp why discrimination is a central feature of LGB asylum claims, and why sexual minorities may seek protection from such mistreatment. Without this understanding, decision-makers would not be able to give the discriminatory treatment within an LGB asylum narrative the seriousness it may deserve, perhaps resulting in a negative decision. Sexual minorities commonly experience discrimination because their identities are perceived to violate the social norms of many communities and societies.<sup>169</sup> The responses of such societies, both at state level and community level, may not involve examples of violent persecution, taking other forms instead, e.g., restrictions on the

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<sup>165</sup> Qualification Directive (n 97) art 9.

<sup>166</sup> *ibid* art 9(2).

<sup>167</sup> UNHCR Handbook (n 136) paras 54-55.

<sup>168</sup> *ibid*.

<sup>169</sup> UNHCR, 'Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A (2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees' (23 October 2012) HCR/GIP/12/09, para 17.

access to healthcare, welfare, legal representation, on the right to private and family life, and on the right to work.<sup>170</sup> Furthermore, the unique experiences of discrimination in the LGB context can include secrecy, forced or pressurised marriages, and the struggle to form meaningful friendships and relationships.<sup>171</sup> Moreover, the fear of mistreatment can compel LGB individuals to behave in ways that fundamentally harm and inhibit their ability to express their sexual orientations freely.<sup>172</sup> Sexual minorities experience these pressures differently to heterosexuals, since a defiance of social norms by the former can cause the exposure of one's sexual orientation and result in harm ranging from dismissal from employment, to sexual violence, or even 'honour killings'.<sup>173</sup> A fair asylum system should apply the thresholds of persecution with a nuanced understanding of the severity of the impact of such practices on LGB people to ensure that, where appropriate, deserving asylum-seekers obtain protection.

Therefore, operating the evidentiary thresholds flexibly represents substantive fairness, as it encourages the decision-maker to understand the practical impact of the maltreatment upon a particular claimant. Decision-makers could misjudge the serious nature of the particular mistreatment of LGB asylum-seekers, failing to understand its impact upon them. It is essential that decision-makers grasp how discriminatory treatment can have different impacts on different groups of people. For LGB people, discriminatory treatment is particularly serious, as it can result in their complete social exclusion, with little or no means of redress.<sup>174</sup> Where there is discriminatory treatment of other groups, it may be that this group has the ability to seek redress from the state, which is rarely available to LGB victims. Thus, for LGB claimants, a pragmatic application of the thresholds of persecution can dictate their inclusion or exclusion from refugee protection.

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<sup>170</sup> *ibid* paras 24-25.

<sup>171</sup> UNHCR, 'Sexual Orientation Guidelines' (n 169) para 23.

<sup>172</sup> *ibid*.

<sup>173</sup> *ibid*.

<sup>174</sup> Christopher N. Kendall, 'Lesbian and Gay Refugees in Australia: Now That "Acting Discreetly" Is No Longer an Option, Will Equality Be Forthcoming?' (2003) 15(4) *International Journal of Refugee Law* 715-49, 717.

## ii. Proving ‘Membership of a Particular Social Group’

Under the second clause of the refugee definition, the decision-maker must accept that a particular identity has motivated the persecution feared, an identity to which the claimant also belongs.<sup>175</sup> For LGB claimants, this involves, first, proving that they belong to a ‘particular social group’ (PSG). Secondly, it involves proving a direct ‘connection’ or relationship between the Convention reason and the persecution forming the reason for the mistreatment. In the refugee definition, this appears as the requirement that protection only be granted where persecution exists ‘for reasons of...’<sup>176</sup>

As stated in the previous chapter, the recognition that sexual minorities are entitled to avail themselves of international refugee protection has been a sluggish process. This has been exacerbated by the limited instruction provided by the Convention drafters as to the ‘Particular Social Group’ (PSG) category definition.<sup>177</sup> The UNHCR Handbook, first published in 1979, merely stated that PSG ‘normally comprises persons of similar background, habits or social status’ and gave no further detail.<sup>178</sup> It was not until 1985, with the US decision of *Matter of Acosta*, that, relying upon the *ejusdem generis* principle, a workable definition was provided.<sup>179</sup> This clarified that sexual orientation could constitute the characteristic of a protectable social group for the purposes of the refugee protection regime.<sup>180</sup>

As this definition of PSG has evolved in the case-law of traditional asylum-receiving jurisdictions, it has resulted in the growing recognition that LGB individuals can form a social group on the basis of their sexual identities. The UNHCR has provided the following definition:

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<sup>175</sup> Timothy Wei and Margaret Satterwaite, ‘Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation’ (Spring 1998) 29 Columbia Human Rights Law Review 467-531, 500.

<sup>176</sup> ECHR (n 24) art 1.

<sup>177</sup> Anthony Good, *Anthropology and Expertise in the Asylum Courts* (Routledge-Cavendish, 2007) 74.

<sup>178</sup> UNHCR Handbook (n 136) para 77.

<sup>179</sup> *Matter of Acosta* 19 I&N Dec. 211 (BIA 1985) [233] (USA). The *ejusdem generis* doctrine is a rule of statutory interpretation which uses general statements about specific classes or people to apply them to similar things. As the Refugee Convention lists five grounds of persecution, their commonalities were used by the Court to define the characteristics of a ‘particular social group’.

<sup>180</sup> *ibid.*

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.<sup>181</sup>

An alternative definition is contained within Article 10(1)(d) of the Qualification Directive, which presents common characteristics and the perception of group status as additive requirements to fulfill in order to be eligible for refugee protection (see Chapter three, section 5.2).<sup>182</sup> A fair system must ensure that the PSG definition is applied with the inherent evolving spirit that characterises the Refugee Convention, evidenced by the preceding principles. Furthermore, understanding the complexity and variability of sexual identity and the process of its construction, expression, and experience, as outlined in the introductory chapter, is also important here. It means that the PSG category must be interpreted inclusively to ensure that genuine sexual minorities can access refugee protection.<sup>183</sup>

Moreover, for sexual identity-based asylum-seekers, another issue regarding the PSG test is extremely important. Claimants must evidence their membership of the social group, i.e., prove that their claimed sexual identity is true. There may be challenges involved for LGB claimants, as many LGB individuals fleeing persecution do not always express their sexualities publicly in their host countries until comfortable, and once safe, or they may never do so out of choice or conditioning.<sup>184</sup> Given that sexuality does not necessarily have external markers, can be difficult to identify, and its expression varies from person to person, there are challenges involved in expecting claimants to prove their sexuality to fulfill the PSG criteria.<sup>185</sup> Once again, the standard of what constitutes a PSG engages substantive fairness, as without its

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<sup>181</sup> UNHCR, 'Sexual Orientation Guidelines' (n 169) para 11.

<sup>182</sup> Qualification Directive (n 97) art 10(1)(d). This provision is incorporated into the domestic law by Regulation 6(d) of the 2006 Regulations (n 164).

<sup>183</sup> Sarah Hinger, 'Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims' (2010) 19 Colum. J. Gender & L. 367, 386-390.

<sup>184</sup> UKLGIG, "'Missing the Mark' - Decision Making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims' (14 October 2013) 23.

<sup>185</sup> Hinger (n 171) 386-390.



inclusive and pragmatic application, sexual minorities fleeing persecution could be wrongly denied protection. The PSG test could be applied to deny that their claimed sexual identity is genuinely held. Given that many deserving applicants could be excluded from protection subsequently, a contrary outcome based on the improper application of the PSG threshold would be substantively unfair. Therefore, addressing the flexibility of the evidentiary thresholds within the structural principles is essential.

iii. 'Reasonable Degree of Likelihood' and the 'Benefit of the Doubt'

The overall test of the RSD requires there to be a 'reasonable degree of likelihood' for believing that the applicant will be persecuted on a Convention ground in their home society. This mostly hinges on the credibility assessment. The European Asylum Curriculum describes the assessment of credibility 'as a tool to establish a set of material facts to which you can apply the refugee definition (the findings of facts)'.<sup>186</sup> Establishing the credibility or believability of an asylum claim is the most important facet of the RSD.<sup>187</sup> After determining whether the terms of the refugee definition are met, the process involves scrutinising the events described by the asylum-seeker to decide whether the claimant is deserving of protection.<sup>188</sup> It is a contentious part of the determination, due to the significant discretion afforded to decision-makers and the inherent subjectivity of such discretion in a system that seeks to be as objective as practically feasible.<sup>189</sup>

As credibility is such a complex, yet integral part of the asylum system, there is an overlap in terms of its character as a substantive and/or procedural issue. From one perspective, it belongs to substantive fairness, because it relates to the decision-making process, such as the use of objective evidence to verify a claim and the assessment of subjective evidence provided by the claimant. From another perspective, however, it also contains a significant procedural element, due to the fact

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<sup>186</sup> European Asylum Curriculum, 'Module 7 on Evidence Assessment' (2007), s.3.1.12.

<sup>187</sup> UNHCR, 'Beyond Proof, Credibility Assessment in EU Asylum Systems' (May 2013) 26.

<sup>188</sup> *ibid* 28.

<sup>189</sup> *ibid*.

that the production of evidence is something that claimants associate as procedural, in terms of producing documentary and narrative evidence to verify their claims for protection. For the purposes of this analysis, the researcher acknowledges this overlap, allowing for the principle to remain one of substantive fairness, whilst acknowledging its procedural interface. Moreover, to coherently examine the application of the overall evidentiary standard, its application is divided into stages and examined separately, recognising the internal (relating to the decision-maker's analysis of objective evidence) and external (relating to the claimant's submission of subjective evidence) elements of the credibility assessment. Therefore, the substantive fairness chapter (Chapter three) examines the application of the 'reasonable degree of likelihood' and 'benefit of the doubt' tests when relying on objective evidence to establish whether the fear of persecution is 'well-founded'. This relates to the refugee definition, therefore, it belongs to the substantive chapter. The use of the tests in the examination of subjective evidence, namely, documentary and narrative evidence elicited from the claimants is contained in the procedural fairness chapter (Chapter four), because of asylum-seekers' perceptions and because many of the issues with this part of asylum system relate to poor 'procedural' conduct on the part of the decision-maker. In terms of length, this also gives the analysis a fairly even split.

Assessing the credibility, or believability, of an asylum claim is an extremely difficult process. This is due to the linguistic and cross-cultural barriers affecting communication, the mindsets of the claimant and decision-maker, evidentiary challenges, and the matter of applying specialist legal concepts.<sup>190</sup> In many instances, the decision-maker must be prepared to work with only the testimony of the claimant, considering whether on the basis of that narrative there is a reasonable basis for believing that the claimant's feared persecution is a likely prospect.<sup>191</sup> Where there are challenges posed by the claimant's ability to substantiate the claim, even to the degree of the lower evidentiary standard of the asylum system ('reasonable degree of likelihood' or 'reasonable basis for believing'), decision-makers have the 'benefit of

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<sup>190</sup> *ibid* 30-33.

<sup>191</sup> UNHCR Handbook (n 136) 205.

the doubt’ principle at their disposal.<sup>192</sup> Where documentary or narrative evidence is flawed but still believable, the ‘benefit of the doubt’ allows refugee protection to be granted.

The discretion afforded to decision-makers within the credibility assessments, allowing them to disregard or stringently apply the ‘benefit of the doubt’ principle, has arguably led to a powerful narrative regarding the operation of a ‘culture of disbelief’ within the RSDs within certain asylum granting countries.<sup>193</sup> A ‘culture of disbelief’ describes practices within asylum systems of denying claims for refugee protection by relying on inconsequential reasons for disbelieving the experiences of asylum-seekers.<sup>194</sup> The inconsequential reasons consist of perceived inconsistencies, implausibilities or a lack of detail that could be explained reasonably, with the believability of the claim being unharmed (Chapter 4). Alternatively, this has been identified as a ‘culture of denial’ due to the attitude and decision-making being systemically inclined towards outright denying asylum claims.<sup>195</sup>

Nonetheless, the requirement to apply the ‘benefit of the doubt’ principle with respect to the unsubstantiated or unsubstantiable parts of asylum-seeker narratives and statements has also been affirmed by the ECtHR:

The Court acknowledges that, owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof.<sup>196</sup>

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<sup>192</sup> *ibid* 203-204. See also, Immigration Rules (n 118) para 339L for ‘benefit of the doubt’ test articulated in domestic UK law.

<sup>193</sup> *ibid*.

<sup>194</sup> *ibid*.

<sup>195</sup> James Souter, ‘A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom’ (2002) 1(1) Oxford Monitor of Forced Migration 48-59, 48.

<sup>196</sup> *R.C. v. Sweden* App no. 41827/07 (Judgment), ECtHR, 9 March 2010 [50]; *N. v. Sweden* App no. 23505/09 (Judgment), ECtHR, 20 July 2010 [53]; *F.H. v. Sweden* App no. 32621/06 (Judgment), ECtHR, 20 January 2009 [95].

The principle enables decision-makers to structure their discretion and decide whether, despite the lack of consistency or evidence, refugee protection is, nonetheless, warranted:

After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. [...] It is hardly possible for a refugee to ‘prove’ every part of his case and, indeed, if this were a requirement the majority of refugees would not be recognized. It is therefore frequently necessary to give the applicant the benefit of the doubt.<sup>197</sup>

For an asylum system to operate fairly, decision-makers must extend the ‘benefit of the doubt’ to claims where, despite weaknesses, the narratives of persecution are ‘on the whole coherent and plausible, and do not run counter to generally known facts’.<sup>198</sup> Both of these tests ensure substantive fairness. Even where there are limitations upon the ability of a decision-maker to make a correct decision, for example, due to minor inconsistencies or evidentiary challenges, the tests allow a genuine and deserving claimant to succeed. This is because the adverse consequences of a negative decision (to refuse the claim) are so significant, and because there are so many barriers involved in the claimant’s ability to present a faultless claim. Substantive fairness thus requires adherence to a lower evidentiary standard than criminal matters, for instance.<sup>199</sup>

The principle of applying the evidentiary thresholds dynamically is vital given the practical limitations of an asylum-seeker’s memory. Human memories struggle to reproduce events without somehow shaping or framing them first, resulting in the loss of many objective details.<sup>200</sup> For victims of torture, sexual violence and other aspects of persecution, the detrimental impact upon one’s memory is very real. Studies note that victims of sexual violence found the trauma of these experiences to affect their overall mental health, as well as their general behaviour and conduct during the

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<sup>197</sup> *ibid.*

<sup>198</sup> ‘Beyond Proof: Credibility Assessments’ (n 187) 249.

<sup>199</sup> *Sivakumaran* (n 143) [994].

<sup>200</sup> Jane Herlihy and Stuart W. Turner, ‘The Psychology of Seeking Protection’ (2009) 21(2) *International Journal of Refugee Law* 171-192, 176.

asylum process.<sup>201</sup> Those suffering from post-traumatic stress disorder (PTSD) struggled with recounting specific occurrences, inhibiting the provision of detailed and consistent accounts, as demanded by decision-makers.<sup>202</sup> The impact of trauma on memory is worsened further by ‘dissociation’, a mechanism of the brain that seeks to protect individuals from trauma by detaching its consciousness from one’s body, emotions and surroundings.<sup>203</sup> When placed into high-pressure environments like the asylum process, the inability to recollect details of persecutory events is heightened, against prevailing assumptions.<sup>204</sup> When utilised properly, the ‘benefit of the doubt’ principle, recognising these challenges and flaws, allows ‘believable’ claims to succeed.

Moreover, this principle regarding evidential flexibility is a much-needed component of the RSD because human behaviour is rarely cogent and consistent.<sup>205</sup> Human lives are rarely rationally expressed, especially in pressurised situations involving mistreatment. Due to the environments of violence, abuse, hostility and oppression that asylum claimants seek refuge from, decision-makers must accept some inconsistency as a feature of asylum claims.<sup>206</sup> Judgements about the likely pattern of human behaviour are unhelpful to credibility assessments. In the LGB context, this is particularly acute, due to the experiences of stigma, shame and secrecy characterising minority sexualities,<sup>207</sup> and the effect of these experiences upon identity development. A ‘perfect’ asylum narrative is rare, and often warrants more suspicion than one with minor inconsistencies, for the fact that real life experiences are rarely logical and seamless.<sup>208</sup> As the UNHCR rightfully contends, even where a claim contains some false statements, the applicant can still establish a credible claim, and

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<sup>201</sup> Diane Bögner, Jane Herlihy, and Chris R. Brewin, ‘Impact of Sexual Violence on Disclosure During Home Office Interviews’ (2007) 191(1) *The British Journal of Psychiatry* 75-81, 78.

<sup>202</sup> Jane Herlihy and Stuart Turner, ‘Memory and Seeking Asylum’ (2007) 9(3) *European Journal of Psychotherapy and Counselling* 267-76, 269.

<sup>203</sup> Steven J. Lynn and Judith W. Rhue, *Dissociation: Clinical and Theoretical Perspectives* (Guilford Press, 1994) 19.

<sup>204</sup> Jenni Millbank, ‘“The Ring of Truth”: A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations’ (2009) 21(1) *International Journal of Refugee Law* 1, 13.

<sup>205</sup> *ibid* 18.

<sup>206</sup> *ibid* 15-21.

<sup>207</sup> Laurie Berg and Jenni Millbank, ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants’ (2009) 22(2) *Journal of Refugee Studies* 195-223, 201.

<sup>208</sup> Tony Talbot, ‘Credibility and Risk: One Adjudicator’s View’ (2004) 10 *Immigration Law Digest* 29.

this is what a correct application of the ‘benefit of the doubt’ principle intends to facilitate.<sup>209</sup>

In the light of the role played by intersectionality and the complexity of sexual identities, the ‘benefit of the doubt’ should be applied with due regard for these principles. Therefore, deciding whether to grant protection under the ‘benefit of the doubt’, the process must avoid recourse to stereotypical conceptions of identity and human behaviour.<sup>210</sup> Given that human sexuality is shaped by factors including our social, cultural, religious and political environments, narrow and restrictive understandings of identity undermine the ability of asylum systems to produce correct decisions, particularly in narratives not adhering to commonly held stereotypes.<sup>211</sup> A fair system recognises this and understands that the RSD must incorporate intersectionality and diverse understandings of sexuality. This must take place in both the composite evidentiary thresholds and in the overall ‘reasonable degree of likelihood’ test. This chapter now explores the principles of procedural fairness.

### **3.2 Procedural Fairness in the Asylum Context**

The second theme of the structural principles is procedural fairness. The framework in this thesis espouses four principles rooted in the doctrine of procedural fairness: first, a right to legal representation; secondly, the use and citation of correct guidance to assist in the production of fair decisions; thirdly, the right to access an impartial system; and, finally, the requirements regarding the recruitment and training of decision-makers.

#### *3.2.1. Access to Competent and Appropriately Skilled Legal Representation for the Duration of Asylum Process*

Access to legal representation is an essential component of the structural principles advanced here to outline the key components of a fair asylum system. As demonstrated by the above discussion on the elements of natural justice, legal

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<sup>209</sup> UNHCR, ‘Sexual Orientation Guidelines’ (n 169) para 98.

<sup>210</sup> Hinger (n 183) 386-388.

<sup>211</sup> LaViolette (n 151) 194.

representation is both a procedural safeguard and a practical necessity depending upon the nature of the right or interest in question.

In the asylum context, legal representation is a critical right of claimants for several reasons. First, the RSD is a complex process, far beyond a system of ‘applying a legal standard to a set of facts’.<sup>212</sup> For example, in addition to the complex legal tests outlined in section 3.1.3 above, the RSD involves interpreting country situations to determine whether the fear of persecution is ‘well-founded’, evaluating evidence or determining claims where there is little or no supporting evidence.<sup>213</sup> Secondly, the ability of claimants to navigate the asylum process is affected by several important intersectional issues. Many asylum-seekers are unfamiliar with the terms of refugee law and asylum procedure.<sup>214</sup> Additionally, there are linguistic and cultural barriers in terms of how claimants navigate the asylum process, as well as obstacles concerning memory and psychological trauma, as the subsequent investigatory chapters will describe. Legal representatives are fundamental in helping claimants to overcome such barriers, and flag up for decision-makers issues that could inhibit a claimant’s participation in the asylum process.

Furthermore, at tribunal level, the British asylum system is primarily adversarial, where the burden of proof is upon the individual seeking protection.<sup>215</sup> The legal representative acts as a ‘bridge’ between the claimant, who is in possession of the facts, and the tribunal judge, who is in possession of legal knowledge and decision-making power.<sup>216</sup> A representative must negotiate these complex legal factors, because the asylum-seeker cannot do so.<sup>217</sup> Within this environment, legal assistance enables the correct representation of an asylum claim, reducing the probability of

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<sup>212</sup> Michael Kagan, ‘Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt’ (March 2006) 19(1) *Journal of Refugee Studies* 45-68, 59.

<sup>213</sup> *ibid.*

<sup>214</sup> UNHCR, ‘Fair and efficient asylum procedures: a non-exhaustive overview of applicable international standards’ (September 2005) para 5.

<sup>215</sup> Robert Thomas, ‘From “Adversarial v. Inquisitorial” to “Active, Enabling, and Investigative”’: Developments in UK Tribunals’ in Laverne Jacobs and Sasha Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes: Global Perspectives* (Ashgate, 2013) 65.

<sup>216</sup> *ibid.* 58.

<sup>217</sup> *ibid.* 65.

errors on the part of both the claimants and decision-makers.<sup>218</sup> Representation enables a person to fully exercise all of his or her available rights and to properly protect such rights.

To an asylum-seeker, it is critical to have access to legal advice or representation. A survey conducted amongst asylum-seekers whose claims were being processed by the UNHCR found that ‘UNHCR case preparation and advice’ was a priority second only to medical care in a list of 15 possible services.<sup>219</sup> For claimants present in Egypt for less than six months to seek asylum with the UNHCR office there, legal representation was their main priority.<sup>220</sup>

The negative repercussions of being without legal representation within the asylum process have been widely documented in both adversarial and non-adversarial proceedings.<sup>221</sup> For example, Schoenholtz and Jacobs found that legal representation had a positive impact on the outcome of asylum claims at all stages of the US asylum system.<sup>222</sup> Even in cases concerning nationalities that were, on average, less successful, legal representation fostered an uplift in positive decisions. They cited the example of Indian asylum-seekers, where only 1% of unrepresented claims were successful, in contrast to the 31% success rate of represented claims.<sup>223</sup> The serious disadvantages of being unrepresented during the asylum process have been disputed by researchers who claim the ability of asylum tribunals to address this through an ‘enabling approach’.<sup>224</sup> This could only be achieved consistently, however, if all

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<sup>218</sup> Kagan (n 212) 60.

<sup>219</sup> Natalie Briant and Andrew Kennedy, ‘An Investigation of the Perceived Needs and Priorities Held by African Refugees in an Urban Setting in a First Country of Asylum’ (2004) 17(4) *Journal of Refugee Studies* 437–459, 450–451.

<sup>220</sup> *ibid.*

<sup>221</sup> Lisa Getter, ‘Few Applicants Succeed in Immigration Courts’ *Los Angeles Times* (15 April 2001) <<http://articles.latimes.com/2001/apr/15/news/mn-51336>> accessed 17 July 2015; Genn and Genn (n 53) 23–45.

<sup>222</sup> Andrew I. Schoenholtz and Jonathan Jacobs, ‘The State of Asylum Representation: Ideas for Change’ (2002) 16 *Georgetown Immigration Law Journal* 739–766, 743.

<sup>223</sup> *ibid.*

<sup>224</sup> Michael Adler, ‘Can Tribunals Deliver Justice in the Absence of Representation?’ (ESRC Paper, 2007) 7 and 16; ‘Tribunal Reform: Proportionate Dispute Resolution and the Pursuit of Administrative Justice’ (2006) 69 *Modern Law Review* 958, 980–2.



judges took this ‘enabling approach’ and were mandated to do so.<sup>225</sup> Alternate research disputes the ability of judges to redress the disadvantage of being unrepresented; within the British asylum context, the prejudicial impact of being unrepresented at tribunal level has resulted in a lower success rate.<sup>226</sup> The overwhelming sense that access to representation can almost dictate the outcome of a case compounds the necessity for all asylum-seekers to be legally represented during the asylum process.

In the asylum context, the right to legal representation is not a matter of discretion. It is an obligation upon the asylum system to ensure, at their own cost, that asylum-seekers are legally represented at these critical stages of the procedure. The UNHCR expressly provides and emphasises that asylum-seekers are entitled to legal representation ‘at all stages of the procedure’.<sup>227</sup> The UNHCR also set out how asylum-seekers are entitled to utilise their representatives, such as having representatives accompany claimants to their asylum interviews.<sup>228</sup> In Article 15, the EU Procedures Directive sets out the right to legal assistance and representation. The right within Article 15 encumbers the state to provide asylum-seekers with a legal representative at the initial stages of their asylum applications, with the state bearing the cost.<sup>229</sup> Furthermore, subject to certain provisions, asylum-seekers are also entitled to free legal assistance in the event that the public authority, i.e., the Home Office, rejects the claim.<sup>230</sup>

Finally, the right to legal representation inherently requires that legal representatives have the competence and skills to adeptly handle each particular claimant’s case. This was also addressed by the UNHCR, which set out three qualifications in order to act as a legal representative: ‘a working knowledge of refugee law and RSD

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<sup>225</sup> Thomas, ‘From “Adversarial v Inquisitorial”’ (n 215) 59.

<sup>226</sup> Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart, 2011) 5–11.

<sup>227</sup> UNHCR, ‘Asylum-Processes: Fair and Efficient Asylum Procedures’ (2001) para 50.

<sup>228</sup> UNHCR, ‘Procedural Standards for RSD under UNHCR’s Mandate’ (2005) s.4.3.3.

<sup>229</sup> Procedures Directive (n 103) art 15(1).

<sup>230</sup> *ibid* art 15(2).

procedures, experience assisting refugee claims, and a thorough understanding of the applicant's claim'.<sup>231</sup>

This requirement is essential in the context of LGB asylum-claims, given the intersectional, diverse and complex nature of sexual identity development and construction, and consequently sexual minority narratives of persecution. To ensure that the British asylum system operates fairly, the obligation of understanding the characteristics of sexual identity-based asylum claims is incumbent upon decision-makers. The obligation is also placed upon legal representatives, given their role in presenting the claim itself, and engaging with the legal standards and evidentiary thresholds that have been described above. The fundamental role that legal representatives play in shaping the issues surrounding the determination of LGB asylum claims is expanded upon within Chapters three and four of this thesis.

### 3.2.2. *Proper Application and Citation of Accurate and Relevant Guidance*

The second principle of the procedural fairness theme concerns the proper application and citation of accurate and up-to-date guidance. It is arguably derived from a number of procedural fairness rights, such as the right to notice, the right to have the reasons for a negative decision communicated to the applicant, and the right to be consulted before a benefit is denied. These rights relate to the ability to hold a decision-maker accountable. The content of this principle is also rooted within the provisions of procedural fairness contained within the Procedures Directive. Article 8(2)(b) encumbers public authorities to ensure that decision-makers have access to accurate and up-to-date information on the conditions within a claimant's country of origin. Furthermore, Article 10 contains equivalent provisions regarding the right to be informed of one's rights and obligations, the right to notice and the right to reasons regarding an adverse decision.<sup>232</sup>

This structural principle of the framework encompasses the proper application of accurate and relevant asylum guidance and its citation in negative decisions. Many asylum systems accept the constraints placed upon their decision-making powers by

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<sup>231</sup> UNHCR, 'Procedural Standards' (n 228) s.4.3.3.

<sup>232</sup> Procedures Directive (n 103) art 10(1)(a), (d) and (e).

disseminating guidance to assist decision-makers with producing correct determinations. For example, the Home Office aims to produce high quality decision-making by issuing internal guidance on the conditions within specific countries of origin on various grounds of claim.<sup>233</sup> These seek to control the discretion of initial decision-makers by outlining, through Asylum Policy Instructions (APIs), Operational Guidance Notes (OGNs), and Country of Origin Information (COI) reports, how a particular claim should be evaluated.<sup>234</sup> Thus, this principle emphasises the role of guidance in producing fair decisions.

Through the rule of law, the court is also entitled to limit the power of public authorities.<sup>235</sup> Similarly, the Immigration and Asylum Chamber (the tribunal dealing with asylum claims) also constrains the Home Office's power, providing guidance through the 'Country Guidance' case system to facilitate good decision-making. Country Guidance cases allow the tribunal 'to provide decision makers with generic guidance as to whether or not country conditions are such that they will generate a risk on return for broad categories of applicant'.<sup>236</sup> In essence, the tribunal uses certain cases to provide general guidance on 'the circumstances for a group of people with a particular characteristic, in the country in question'.<sup>237</sup> Once a Country Guidance case has been reported, it is up to first-instance decision-makers and subsequent immigration judges to interpret and apply its guidance in similar claims.<sup>238</sup> In this way, Country Guidance cases are authoritative for Home Office and tribunal decision-makers. The Country Guidance system aims to prevent a lengthy, inefficient and costly operation of decision-making within the British asylum system. It does so by treating 'like cases alike' and ensuring that 'generally recurring factors relating to country conditions are the subject of careful and authoritative assessment

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<sup>233</sup> Elizabeth Williams et al., 'The Use of Country of Origin Information in Refugee Status Determination: Critical Perspectives' (*IAS*, May 2009).

<sup>234</sup> The Home Office's Asylum Policy Instructions (APIs) are available here: <<https://www.gov.uk/topic/immigration-operational-guidance/asylum-policy>> accessed 17 July 2015.

<sup>235</sup> Endicott (n 2) 18-22.

<sup>236</sup> Robert Thomas, 'Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom' (2008) 20 *International Journal of Refugee Law* 489-532, 493-495.

<sup>237</sup> *AS and AA v. Secretary of State for the Home Department (Effect of previous linked determination) Somalia* [2006] UKAIT00052 [63].

<sup>238</sup> Thomas, 'Consistency in Adjudication' (n 236) 494.

periodically’.<sup>239</sup> Together with the use of APIs, OGNs, and objective COI reports, Country Guidance cases are utilised to promote consistency within asylum decision-making.<sup>240</sup>

Due to the instructive role that Country Guidance cases play, simultaneously restricting decision-maker discretion and facilitating the production of fair and consistent decisions, the application of the aforementioned guidance forms a critical component of the structural principles. This is subject to further development, however. To ensure confidence in the guidance itself and the way it is used to produce fair (and hopefully, correct) decisions, asylum systems have the responsibility to ensure that their guidance is current, accurate and relevant.<sup>241</sup> In certain countries, where the situation is dynamic or rapidly changing, information can become outdated, inaccurate or irrelevant. Thus, although the Home Office should ensure that its guidance is regularly updated, decision-makers should also supplement this guidance with independent alternatives.<sup>242</sup> This would allow decision-makers to overcome the shortcomings of internal documents or problematic case-law, especially where these do not necessarily reflect the situation on the ground.

To ensure the accountability of the determinations themselves and reported issues with interpreting guidance, the structural principles recognise the importance of decision-makers directly citing their use of the respective guidance.<sup>243</sup> This is where the duty to give reasons in administrative law is embedded within this particular structural principle. Limiting the discretion of decision-makers in this way, by making them cite the guidance (and their interpretation) within adverse decisions, is critical to maintaining confidence in the British asylum system, and to the ability of asylum-seekers to challenge incorrect decisions. In this way, through fresh asylum claims or appeals, incorrect decision-making can be held accountable.

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<sup>239</sup> *KA v. Secretary of State for the Home Department (draft-related risk categories updated) Eritrea CG* [2005] UKAIT00165 (AIT) [10].

<sup>240</sup> Thomas, ‘Consistency in Adjudication’ (n 236) 494.

<sup>241</sup> Natasha Tsangarides for Immigration Advisory Service (IAS), ‘The Refugee Roulette: The Role of Country Information in Refugee Status Determination’ (January 2010) 100-101.

<sup>242</sup> *ibid.*

<sup>243</sup> Thomas, ‘Consistency in Adjudication’ (n 236) 495.

The need for accountability and control regarding decision-maker discretion is just as important to sexual identity-based asylum claims as it is to claims on other Convention grounds. Accountability through this particular principle is significant in LGB claims due to the substantial challenges regarding the availability of appropriate guidance. For example, although objective country reports are utilised to provide instruction on the conditions in a claimant's home society, in the LGB context, the availability of relevant, accurate and up to date information is often insufficient.<sup>244</sup> The reasons for insufficient guidance are varied, but generally, most human rights reports contain small, generalised sections on conditions for LGB individuals.<sup>245</sup> These reports do not provide, and were never intended to provide, the detailed and complex information that is required for an asylum determination.<sup>246</sup>

One can point to two broader causes of this problem. First, the stigma attached to sexual orientation means that information regarding the persecution of sexual minorities is either absent from the 'official' consciousness or deliberately suppressed by traditional asylum origin countries.<sup>247</sup> Secondly, activists are placed under danger to obtain such information. State authorities and non-state agents increasingly attack activists in order to prevent such information from leaking into the global awareness.<sup>248</sup> Given the possibility of restrictions on the availability of satisfactory guidance in many LGB claims, decision-makers must rely upon the guidance available with the knowledge that it may lack the detail or accuracy needed for the RSD. It is necessary that, where guidance is detailed, relevant and accurate, it be applied. Where it is insufficient, the guidance should be supplemented by external alternatives. At all stages, decision-makers must cite the guidance that they have relied upon in making the decision and explain how they have interpreted it. This ensures that decision-making in LGB claims is transparent, and where needed, challenged.

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<sup>244</sup> LaViolette (n 151) 204-206.

<sup>245</sup> *ibid.*

<sup>246</sup> *ibid* 206.

<sup>247</sup> *ibid.*

<sup>248</sup> *ibid* 205.

### 3.2.3. *The Rule Against Bias within the Asylum System*

The penultimate principle under the procedural fairness theme concerns impartiality within RSDs and, more broadly, within the asylum system itself. Returning to procedural fairness in UK administrative law, this principle seeks to expand upon the rule against bias as identified in the test of *Porter v. Magill*.<sup>249</sup> This principle is also based on the obligation within Article 8(2)(a) of the Procedures Directive, which mandates that the RSDs be conducted ‘individually, objectively and impartially’, which is also articulated by Article 41(1) of the EU Charter.

The negative impact of partiality on the fair exercise of power is considerable.<sup>250</sup> Partiality essentially constitutes ‘undue or unfair favouring’ of one person over another,<sup>251</sup> which in asylum may translate into favouring some asylum-seekers to the detriment of others. In the asylum context, the structural principles espouse two complementary sub-principles in relation to the duty to act impartially: first, that applicants cannot be subjected to prejudicial or differential treatment within the procedure and the determination; and secondly, that at a macro-level, the system must operate without structural prejudices, independent, as far as possible, of competing political agendas.

- i. Access to impartial and non-discriminatory treatment within the asylum process and determination

The first aspect of partiality that the structural principles deem critical to the fair operation of an asylum system is the elimination of ‘personal bias’.<sup>252</sup> This concerns the personal feelings or preferences of the individual or, in the asylum context, the public authority official or the immigration judge. Galligan describes the ‘guiding test’ of personal bias as whether, ‘because of some such factor, the judge or other official has pre-judged or is rendered incapable of properly judging or deciding the issue’.<sup>253</sup>

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<sup>249</sup> *Porter v. Magill* (n 48) [102-103].

<sup>250</sup> Galligan (n 1) 441.

<sup>251</sup> Oxford English Dictionary Online, ‘Partiality’ <<http://www.oed.com>> accessed 27 November 2015.

<sup>252</sup> Galligan (n 1) 441.

<sup>253</sup> *ibid* 438.

An imperative question concerns why it is necessary to constrain decision-maker discretion through explicit reference to principles on partiality and bias. As acknowledged in the introductory chapter of this thesis, asylum systems do not operate in a vacuum. In the UK, like many other asylum-receiving jurisdictions, the asylum system functions in the context of an increasingly negative narrative of migration. Asylum-seekers are portrayed as ‘bogus’ economic migrants whose numbers must be restricted, particularly in times of economic hardship.<sup>254</sup> A capacity for influence exists as asylum systems tend to be operated by government bodies, which are particularly sensitive to the impact upon their electability of societal attitudes towards particular issues. For example, for the purposes of political capital, governments can make assurances to their societies that they are committed to reducing migration. This influences their internal policies and the attitudes and approaches of decision-makers towards asylum claims.<sup>255</sup> Due to the potential traction of these narratives upon the operation of an asylum system, it is necessary to explicitly proscribe partiality.

In the light of the socio-political and economic climates within which the asylum system must position itself, impartiality is essential, at both procedural and substantive levels.<sup>256</sup> Dworkin’s duty of ‘equal concern and respect’ and Locke’s and Rawls’ original contracting position, alongside the provisions espoused on differential treatment are relevant here. The rule against personal bias also encompasses the right for asylum-seekers to be treated respectfully by those involved in making RSDs. Once again, justice must be seen to be done, to ensure that disrespectful treatment is not assumed by asylum-seekers to be motivated by bias or disapproval.

In the LGB context, we return to the recognition of civil rights for sexual minorities as a relatively recent development in traditional asylum-receiving states. Such rights are enshrined within the British asylum system. For example, s.4 of the Equality Act 2010 lists sexual orientation as a ‘protected characteristic’, in relation to which

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<sup>254</sup> Gareth Mulvey, ‘When Policy Creates Politics: the Problematising of Immigration and the Consequences for Refugee Integration in the UK’ (2010) 23(4) *Journal of Refugee Studies* 437-462, 445.

<sup>255</sup> *ibid.*

<sup>256</sup> Fatma Marouf, ‘Implicit Bias and Immigration Courts’ (2011) 45 *New England Law Review* 417.

Chapter 2 of the Act prohibits various forms of discrimination.<sup>257</sup> Yet, the asylum system as a whole does not guarantee a full understanding of sexual identity, nor does it eliminate homophobia or prejudice in the minds of asylum officials. Given the documented existence of concerns about the quality and impartiality of decision-making in the area of sexual identity-based asylum claims,<sup>258</sup> the elimination of ‘personal bias’ from asylum systems is a priority in relation to LGB claims. It is essential to the integrity of the system and claimants’ cooperation with it that LGB asylum-seekers do not experience homophobia within the process. This also extends to ensuring homophobic or stereotypical notions of sexual identity do not influence that decision-making.<sup>259</sup> One re-emphasises the aforementioned importance of focusing on the identities of LGB people, rather than their behaviour, to avoid wrongly treating sexuality as synonymous with sexual practice. This is explored further within the following analytical chapters.

- ii. No structural impartiality, allowing the decision-making process to operate free from political agendas

The second aspect of the rule against bias concerns the elimination of ‘systemic bias’. This describes prejudicial attitudes, behaviours or policies arising from within an organisation.<sup>260</sup> Difficult to prove, due to the inability to trace it within the actions of decision-makers, it is equally difficult to eradicate.<sup>261</sup> Systemic bias is supremely important to the asylum system, given its position within the aforementioned context. In recent years, the narrative of seeking asylum has been framed in deliberately impassioned and leading terms, away from the concept of harm. Instead, asylum-seekers are framed in ‘aquatic’ language, in terms of the opening of ‘floodgates’ or arrival in ‘waves’.<sup>262</sup> Asylum-seekers are portrayed as threats to security,<sup>263</sup>

<sup>257</sup> Sections 13, 19, 26 and 27 of the Equality Act 2010 describe the discriminatory conduct prohibited.

<sup>258</sup> UKLGIG, ‘Missing the Mark’ (n 184).

<sup>259</sup> Deborah A. Morgan, ‘Not gay enough for the government: Racial and sexual stereotypes in sexual orientation asylum cases’ (2006) 15 *Law & Sexuality: Rev. Lesbian, Gay, Bisexual & Transgender Legal Issues* 135.

<sup>260</sup> Galligan (n 1) 438.

<sup>261</sup> *ibid.*

<sup>262</sup> Erik Bleich, ‘Integrating Ideas into Policy-making Analysis: Frames and Race Policies in Britain and France’ (2002) 35(9) *Comparative Political Studies* 1054–1076, 1064.

<sup>263</sup> Didier Bigo, ‘Frontiers and Security in the European Union: the Illusion of Migration Control’ in Malcolm Anderson and Eberhard Bort (eds), *The Frontiers of Europe* (Pinter, 1998).



welfare,<sup>264</sup> economic survival<sup>265</sup> and community cohesion.<sup>266</sup> Once again, the result is that this political climate, where asylum-seekers are viewed as opportunistic and burdensome, can easily influence the policy and overall attitudes of the hierarchy responsible for operating an asylum system.

Looking at the UK context specifically, as a result of the traction that the anti-migration narrative has gained, the Home Office has been under greater pressure to restrict the numbers of migrants entering and remaining with the UK.<sup>267</sup> A feared by-product of the posturing of successive governments and Secretaries of State to reduce migration figures is the erosion of impartiality at an institutional level. Indeed, numerous refugee and human rights organisations have made accusations of systemic bias within a number of traditional asylum-receiving states, including the UK.<sup>268</sup> It is alleged that the aforementioned political narratives inform the systematic practice of denying individuals refugee status (outlined as the ‘culture of disbelief’ or ‘denial’ under section 3.1.3 (iii) above), even where there is belief, to some extent, in the merits of their claim.<sup>269</sup>

As a result of the ability for political narratives and policies to affect the way asylum claims are treated, this principle underscores that a truly fair asylum system should, as far as possible, insulate decision-making from political agendas. This is to ensure confidence in the system and for decisions to be taken fairly and correctly, within the standards espoused by the Refugee Convention and international human rights law.

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<sup>264</sup> Andrew Geddes, ‘Migration and the Welfare State in Europe’ (2003) 74 *Political Quarterly* 150–162, 150.

<sup>265</sup> Kamal Ahmed, ‘Green Card Crackdown on Migrant Workers’ *Observer* (30 September 2001) <<http://www.theguardian.com/politics/2001/sep/30/uk.immigration>> accessed 17 July 2015; Souter (n 183) 48.

<sup>266</sup> ‘The world is changing so fast that the reality we are dealing with—mass migration, organized crime, Anti-Social Behaviour—has engulfed systems designed for a time gone by. When we can’t deport foreign nationals even when inciting violence the country is at risk.’ Tony Blair, Speech to Labour Party Conference (26 September 2006).

<sup>267</sup> Jonathan Portes, ‘Immigration: Could we – should we – stop migrants coming to Britain?’ *Observer* (19 October 2014) <<http://www.theguardian.com/uk-news/2014/oct/19/immigration-policy-ukip-restrictions-european-union>> accessed 17 July 2015.

<sup>268</sup> Amnesty International UK (AIUK), ‘Get It Right. How Home Office Decision-Making Fails Refugees’ (2004); Trevor Trueman, ‘Reasons For Refusal: an Audit of 200 Refusals of Ethiopian Asylum-Seekers in England’ (2009) 23(3) *Journal of Immigration, Asylum and Nationality Law* 281–308; Medical Foundation for the Care of Victims of Torture, ‘Culture of Disbelief’ (2009).

<sup>269</sup> Souter (n 195) 55.

There would be significant concerns about the ability of asylum systems to protect vulnerable asylum-seekers in securing their lives if such systems did not adhere to these standards due to external pressures.

Accusations of the operation of a ‘culture of disbelief’ have also arisen within the context of RSDs in LGB claims.<sup>270</sup> As with claims based on other Convention grounds, several jurisdictions have denied the claims of LGB people on specious grounds and alleged poor credibility.<sup>271</sup> In the LGB context, however, this is bolstered through the decision-maker’s reliance on stereotypical understandings of sexual identity. The analytical chapters of this thesis will also play close attention to whether there is a systemic lack of impartiality on the part of British asylum decision-makers in the context of LGB asylum claims. Prior research and the destructive political narrative around asylum-seekers both indicate a practice of mistreating and denying genuine LGB claims refugee protection.

#### *3.2.4. High Quality Recruitment and Training of Decision-Makers.*

The final structural principle addresses the calibre of personnel involved in operating and maintaining a fair asylum system. It engages procedural fairness in that it encompasses many of the rights of natural justice, such as the right to impartial treatment, notice, reasons and consultation, and interlinks with substantive fairness. This principle also builds on the previous discussion on Article 8(2)(c) of the Procedures Directive, addressing the knowledge and ability of decision-makers to make fair asylum decisions.

Without appropriate recruitment and training, decision-makers will not have the ability to operate the decision-making process fairly. Moreover, without the appropriate skills, decision-makers would produce decisions that are also unfair in substance. If decision-makers cannot implement the instructions derived from the structural principles, the framework is rendered ineffectual, and the fairness of decision-making, procedurally and substantively, cannot be guaranteed.

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<sup>270</sup> Jenni Millbank, ‘From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom’ (2009) 13(2-3) *International Journal of Human Rights* 391-414.

<sup>271</sup> *ibid.*

Consequently, these principles address the quality of personnel in terms of the recruitment and training of decision-makers. Addressing the ability of decision-makers to implement the structural principles is just as important as defining the content of the structural principles themselves. This is further exemplified by recital 10 in the preamble to the Procedures Directive, which states that decision-makers must have ‘the appropriate knowledge or receive the necessary training in the field of asylum and refugee matters’.<sup>272</sup>

The integral nature of recruitment and training mechanisms to securing fair decision-making was discussed by the Home Affairs Select Committee report of 2003-2004. The report grounded its criticism of the poor quality of initial decision-making in a number of factors, including the ‘overall calibre and training of those responsible for RSDs at the initial stage’.<sup>273</sup> Indeed, without ensuring that asylum decision-makers possess the appropriate experience and skills to make correct decisions, an asylum system cannot discharge its duty to act fairly. Thus, the structural principles oblige asylum systems to address their recruitment and training methods to ensure that their decision-making power is exercised according to the high standards of fairness required in the asylum context.

With regard to recruitment and training, the UNHCR spent several years intervening in the standards operated within the UK context.<sup>274</sup> As a result, it identified key principles addressing the experiences and skills required by decision-makers to conduct fair decisions. These standards are relied upon in this framework. On the matter of recruitment, the UNHCR held it necessary to institute minimum educational requirements to ensure that prospective decision-makers could handle the complexities of refugee law and make high quality RSDs.<sup>275</sup> The necessary minimum experience was a university degree (or equivalent) and specific experience or skills

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<sup>272</sup> Procedures Directive (n 103) recital 10.

<sup>273</sup> Home Affairs Select Committee, ‘Asylum Applications’ (Second Report, 2003-04) HC 218, para 144.

<sup>274</sup> UNHCR, ‘Quality Initiative Project: A UNHCR Review of the UK Home Office Refugee Status Determination Procedures’ (2005-2009).

<sup>275</sup> UNHCR, ‘(QI) Quality Initiative Project: First Report to the Minister’ (March 2004 – Jan 2005) 3.

relating to the asylum area.<sup>276</sup> The UNHCR addressed the advertising of decision-maker roles in the employment market. The importance of targeted recruitment was highlighted by many decision-makers initially applying for civil service roles without the knowledge that they were to be involved with asylum determinations, and the disaffection of many with the asylum system.<sup>277</sup> This would involve targeting job advertisements at those interested in employment within the asylum field, with clear asylum-specific requirements and descriptions regarding the role and ideal applicant. The UNHCR contended that this would improve the quality of decision-making, the efficiency and cost-effectiveness of the system overall, and morale and motivation of new recruits, which the structural principles support.<sup>278</sup>

On the matter of training, the UNHCR highlighted that the training of decision-makers, at initial stages upon recruitment and on a continuing basis, is also essential to maintaining a fair asylum system. For new recruits, the UNHCR identified necessary training on developing competent interviewing skills and on working with interpreters.<sup>279</sup> Additionally, they required training on conceptual and legal (and evidentiary) matters with regard to the Refugee Convention and ECHR, to help produce fair decisions.<sup>280</sup> The UNHCR also made clear that the period of foundational training would not be complete without testing the newly attained skills of decision-makers.<sup>281</sup> Thus, it required new interviewers and decision-makers to be subjected to live interview sampling and competency assessments until it was clear that they had the sufficient skills to conduct fair and consistent decision-making.<sup>282</sup> If they were repeatedly unable to do so, the UNHCR held it inappropriate for such recruits to be utilised as interviewers or decision-makers.

Addressing the ongoing development of decision-makers, it was highlighted by the UNHCR that regular, ongoing training of a high quality nature in the long term

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<sup>276</sup> *ibid.*

<sup>277</sup> *ibid* 10.

<sup>278</sup> *ibid* 9.

<sup>279</sup> UNHCR, '(QI) Quality Initiative Project: Third Report to the Minister) (Sep 2005 - Feb 2006) 22.

<sup>280</sup> *ibid.*

<sup>281</sup> *ibid.*

<sup>282</sup> *ibid*; UNHCR, 'Quality Initiative Project: First Report' (n 275) 4.

improved the consistency of decision-making.<sup>283</sup> It allowed caseworkers to develop specialist knowledge and helped to ensure the retention of decision-makers. Identifying weaknesses in the British asylum system's training programme at the time, the UNHCR recommended that 'minimum standards' for internal trainers be implemented, in the form of 'training for trainers' accreditation.<sup>284</sup> It also called for such courses to be appraised regularly through written and oral feedback. Finally, the UNHCR encouraged the use of external speakers and trainers to address asylum decision-makers, supplementing existing internal training.<sup>285</sup> The structural principles endorse each of these salient recommendations, forming the basic guidelines on how training and recruitment issues can be addressed to ensure the fairness of decision-making within any asylum system and on any Convention ground.

Issues regarding training are extremely important to determining the claims of LGB asylum-seekers. Researchers and academics have identified the necessity to train decision-makers (at both initial stage of recruitment and on an ongoing basis) on issues pertaining to sexual identity-based asylum claims.<sup>286</sup> Indeed, this thesis has stressed, on several occasions, the need for decision-makers to understand the diversity of sexual identity and its complexity (and the impact of this on human behaviour). They must also possess the ability to conduct intersectional decision-making. Logically, this requires training to ensure a basic knowledge and skillset amongst decision-makers, and to assist towards creating a uniformity of approach. Given the earlier clarifications regarding the absence of sexual identity from the Refugee Convention and the struggle of LGB individuals to be recognised as the subjects of refugee claims, one cannot presume that these aims have been met already.

LaViolette describes the training required in the LGB context as 'LGBT Cultural Competency Training'.<sup>287</sup> This encompasses awareness and attitudes, knowledge, and skills, with regard to the identities and experiences of sexual minorities. Just as

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<sup>283</sup> *ibid* 10.

<sup>284</sup> *ibid* 14.

<sup>285</sup> *ibid*.

<sup>286</sup> Millbank, 'The Ring of Truth' (n 204) 28.

<sup>287</sup> Nicole LaViolette, 'Overcoming Problems with Sexual Minority Refugee Claims: is LGBT Cultural Competency Training the Solution?' in Thomas Spijkerboer (ed), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge, 2013) 189-216.

the UNHCR identified in its 2003-04 reports the existence of ongoing training courses on gender issues, issues of sexual identity also deserve to be addressed.<sup>288</sup> The quality of such training should be secured through the use of external experts to critique and give feedback on the content of internal courses.<sup>289</sup> External experts should also be used to address Home Office staff working on sexual identity-based asylum claims. Without these specific skills, decision-makers would lack the knowledge necessary to determine LGB claims correctly and fairly. Additionally, it would almost certainly result in deserving claims being denied protection due to the ignorance of decision-makers regarding the reality of LGB narratives of persecution. Thus, appropriate training and recruitment mechanisms are essential components of a fair asylum system.

#### 4. Conclusion

This theoretical chapter had two objectives. First, it sought to address why fairness was the appropriate standard for this investigation to assess the quality of the British asylum system's decision-making in sexual identity-based asylum claims. Secondly, it sought to propose the structural principles by which the British system will be assessed. The first part of the chapter highlighted that fairness is the appropriate standard for this thesis because it is a principle that is furnished with clear meaning and with philosophical arguments bolstering its importance. Furthermore, it is an accepted principle of UK law, as the provisions of administrative law and international and supranational law have evidenced. Building upon the concept of fairness, the second part of this chapter advanced a set of principles that should act as the foundation of any fair asylum system. Without respecting the fundamental rights of asylum-seekers, treating the Refugee Convention pragmatically and flexibly, and ensuring the high-quality recruitment and training of decision-makers, a fair system cannot exist. Other central components of a fair asylum system include: the availability of good guidance and ensuring that it is properly cited and interpreted when any guidance is used, access to competent legal representation, and for an

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<sup>288</sup> UNHCR, 'Quality Initiative Project: Third Report' (n 279) 12.

<sup>289</sup> Millbank, 'The Ring of Truth' (n 204) 28.

asylum-seeker to be offered impartial treatment, both in the steps of the asylum process and the substance of determining the asylum claim.

The structural principles form the components of an analytical framework and can fall into two broad themes. The first relates to substantive fairness, which relating to a person's interest in a fairly constituted decision. For the refugee context, this chapter conceives substantive fairness around the relationship between fairness and rights for asylum-seekers, as a greater appreciation of this relationship is critical to ensuring substantive fairness in LGB asylum claims. The second theme of the structural principles relates to the rights of procedural fairness, drawn from the procedural fairness principles in administrative law. Within Chapters three and four, the British asylum system, as assessed through doctrinal and empirical research, will be subjected to a thematic analysis according to the structural principles identified in this chapter.

## Chapter Three

### **SUBSTANTIVE FAIRNESS: WELL-FOUNDED FEAR OF PERSECUTION FOR REASONS OF MEMBERSHIP OF A 'PARTICULAR SOCIAL GROUP'**

#### 1. Introduction

This chapter begins the analysis of the British asylum system from the perspective of sexual identity-based asylum claims. Following the separation between substantive and procedural fairness in administrative law, this chapter examines issues of substantive fairness using the structural principles advanced in Chapter two of this thesis and the key concepts adopted in Chapter one (intersectionality and sexual diversity). Despite this, it is important to note that some aspects of the analysis in this chapter speaks to procedural fairness too, due to the overlap between substantive and procedural fairness, and because substantive and procedural fairness are interdependent, with, for example, procedural tools being integral to improving substantive fairness. Nevertheless, as the substance of the refugee protection regime is contained first in the refugee definition, this forms the primary focus of this chapter. Article 1(A) of the Refugee Convention provides that a 'refugee' is a person who has a 'well-founded fear of being persecuted, for reasons of race, religion, nationality, membership of a particular social group and political opinion'. This chapter explores the components of this definition, which outlines the eligibility for refugee protection. It also examines the application of these components in the context of claimants seeking asylum in the UK on the basis of their sexual identity.

The first part of the chapter focuses on the first clause in the refugee definition, namely holding a 'well-founded fear of persecution'. It begins by exploring the definition and thresholds of persecution with regard to issues common to LGB narratives. It explores whether relocating to another part of one's home society can negate the risk of persecution. It also examines the role of objective Country of Origin Information (COI) to verify independently the LGB claimant's fear of



persecutory harm. The second part of the chapter addresses the second clause of the definition, which in the LGB context relates to persecution being, ‘for reasons of membership of a particular social group’. Here, the investigation focuses on how ‘particular social group’ has been defined and how this definition has been applied to LGB asylum claims. At each stage of the investigation, the empirical data derived from research conducted for this thesis will be woven into the analysis.

## 2. Defining the Notion of ‘Persecution’ and Applying this Definition to the Sexual Identity Context

The Refugee Convention provides no definition of persecution. The Convention drafters left no guidance on its interpretation in the *travaux préparatoires*. They deliberately avoided furnishing the concept with a specific meaning for several plausible reasons: providing a correct definition was impossible, doing so was dangerous, for allowing its prescriptive application to exclude deserving claimants, or perhaps, they feared that a definition would become outdated and prevent the Convention from serving its humanitarian purpose.<sup>1</sup> Indeed, these ideas were summarised by the UNHCR’s acknowledgement that ‘there is no universally accepted definition of “persecution”’ and that all attempts to generate one had been fruitless.<sup>2</sup> Nonetheless, a working definition has developed, the process of which is explored here.

In the sexual identity context, the British asylum system’s recognition that LGB individuals are eligible to receive refugee protection has involved understanding that they can experience persecution in unique and nuanced ways. This is now reflected in the UNHCR guidelines and domestic guidance addressing claims based on sexual identity.<sup>3</sup> The UNHCR emphasises the intricacy of such claims. It states that an

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<sup>1</sup> Hugo Storey, ‘What Constitutes Persecution? Towards a Working Definition’ (2014) 26(2) *International Journal of Refugee Law* 272, 273.

<sup>2</sup> UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (December 2011) HCR/1P/4/ENG/REV, para 51.

<sup>3</sup> Home Office, ‘Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim’ (February 2015).

assessment of persecution in a sexual identity-based asylum claim is a complex determination, incorporating ‘the circumstances of the case, including the age, gender, opinions, feelings and psychological makeup’ of the applicant.<sup>4</sup> When assessing persecution, decision-makers should balance the notion of ‘individual dignity and human dignity’ with ‘the manner and degree to which they stand to be injured’.<sup>5</sup> It is necessary, therefore, to scrutinise how the British asylum system strikes this balance with respect to persecution in sexual identity-based protection claims.

To undertake this investigation, this section explores the evolution of the persecution definition, generally, first, and then in the British context. Subsequently, it addresses common types of mistreatment experienced by LGB individuals and how they are perceived to engage the thresholds of this persecution definition. These include criminal sanctions against same-sex sexual acts, psychological harm, and the role of discretion in reducing the risk of persecution.

## 2.1 Persecution: A Definition in Development

An early attempt by asylum-receiving jurisdictions to furnish persecution with meaning was related to the ‘ordinary’ or ‘dictionary’ definition. This was based on the principle enshrined in Article 31 of the Vienna Convention on the Law of Treaties, which states that words and phrases within international treaties should be treated ‘in accordance with the ordinary meaning...in their context and in the light of its object and purpose’.<sup>6</sup> The definitions that arose were undoubtedly based on the Latin meaning of ‘*persequi*’, ‘to follow with hostile intent’, from which persecution is derived.<sup>7</sup> For example, in the Australian case of *Jonah*, the tribunal defined persecution as ‘to pursue with malignancy or injurious action’.<sup>8</sup>

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<sup>4</sup> UNHCR, ‘Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A (2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees’ (23 October 2012) HCR/GIP/12/09, para 16.

<sup>5</sup> Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP, 2007) 131-132.

<sup>6</sup> ‘Vienna Convention on the Law of Treaties’ (Adopted 23 May 1969, Entered into Force 27 January 1980) United Nations, Treaty Series, vol. 1155, p. 331, art 31.

<sup>7</sup> Storey (n 1) 275.

<sup>8</sup> *Jonah v. Secretary of State for the Home Department* [1985] Imm AR 7.

Whilst these ‘dictionary’ definitions gained traction and the ‘ordinary’ approach was followed across jurisdictions, it was, nonetheless, unsatisfactory. Divergent approaches to persecution across linguistic boundaries, depending upon how a particular language defined persecution, meant that a universal understanding of the concept could not be developed.<sup>9</sup> This resulted in the ‘human rights’ approach to the persecution definition, which has become ‘dominant’ within the theory of refugee law and in practical decision-making.<sup>10</sup> A human rights approach provides clarity by attaching the concept of persecution to identifiable (and arguably, universal) standards, whilst providing scope for elasticity and pragmatism.

The human rights approach developed the concept of persecution in two notable ways. First, Hathaway, the leading proponent of the human rights formulation, describes persecution as existing only where a state has breached its basic obligation to protect its citizens, forcing them to seek alternative protection abroad.<sup>11</sup> If the state provided protection, persecution would not exist. Thereupon, it is essential for a claimant to establish, within the analysis on persecution, the complicity of the state in the mistreatment experienced and/or feared. Secondly, as the duties owed by a state to its subjects are central here, one should determine whether the state has actually failed to meet its obligations.<sup>12</sup> For Hathaway, the standards provided by international human rights law were the best tools for this assessment. Both refugee law and international human rights law shared the purpose of protecting individuals against actions depriving them of their core dignity.<sup>13</sup>

In summary, Hathaway argued that persecution would only exist where the maltreatment relates to a violation of one’s fundamental human rights.<sup>14</sup> The appropriate standard could therefore be abbreviated as ‘the sustained or systemic denial of core human rights’.<sup>15</sup> This conception expands the decision-maker’s duty in

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<sup>9</sup> Storey (n 1) 275.

<sup>10</sup> *ibid* 276.

<sup>11</sup> James C. Hathaway, *The Law of Refugee Status* (1st edn, Butterworths, 1991) 106-108.

<sup>12</sup> *ibid*.

<sup>13</sup> *ibid*.

<sup>14</sup> James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP, 2014) 193-196.

<sup>15</sup> Hathaway (n 11) 108.

the RSD. From initially applying a set and plain definition, a decision-maker must identify persecution as a human rights violation from a set of circumstances, an exercise of increased complexity.<sup>16</sup>

Additionally, Hathaway explained what would constitute the denial of ‘core human rights’, attaching persecution to international human rights standards, as this thesis has done with fairness in Chapter two. With reference to the International Bill of Rights, he argued that there was a hierarchy consisting of four categories of rights.<sup>17</sup> Depending upon the category infringed, there would be different consequences for the thresholds of persecution. The first category of rights consists of those contained in the Universal Declaration on Human Rights (UDHR) (and made binding by the International Covenant on Civil and Political Rights (ICCPR)), from which no derogation is possible. An example would be the right to be protected from torture or inhuman and degrading treatment. If the State fails to protect against a breach of the rights in this tier, the thresholds of persecution are met immediately and protection warranted. The second category concerns those rights that are found in the UDHR and ICCPR, but from which derogation would be permitted in times of ‘public emergency’.<sup>18</sup> This incorporates rights such as the freedom from arbitrary arrest or detention, the right to a fair and public hearing in criminal proceedings, and the protection of person and family, private life and integrity, for example. Here, the failure to protect these rights only constitutes persecution if the derogation is not mandated by the state for reasons of emergency. These grounds are, nonetheless, subject to conditions contained within the basic principles of international law and non-discrimination. The third category covers the rights from the UDHR that are incorporated into the International Covenant on Economic, Social and Cultural Rights (ICESCR), which codifies a state’s obligation to ensure that basic resources are equally accessible, free of discrimination. These basic values include the right to work, housing, medical care, food and clothing. A state would violate these rights where it either fails to apply these rights, or excludes a minority from access to

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<sup>16</sup> Hathaway and Foster (n 14) 186.

<sup>17</sup> Hathaway (n 11) 108-110.

<sup>18</sup> *ibid.*

them.<sup>19</sup> The deprivation would need to be extreme in order to meet the persecutory thresholds. Finally, the fourth category consists of rights contained in the UDHR, which were not carried forward into any of the covenants, such as the right to own or to be free from arbitrary deprivation of property. The infringement of these rights would not amount to persecution.

Hathaway's exposition of the human rights approach to persecution has been supported by many academics and asylum-granting jurisdictions. For example, Anker reinforced the role that human rights standards must play in this part of the refugee definition.<sup>20</sup> She offered a set of general principles to be used as a code of standards when determining whether the persecutory thresholds are fulfilled.<sup>21</sup> From these standards, she concurred that 'the fundamental failure of the State in providing protection' is crucial to the definition of persecution and asylum determination.<sup>22</sup> If the state is unwilling or unable to 'assume its duty of protection to its nationals', in either controlling its own agencies or non-state entities, a fear of mistreatment constituting serious harm for a Convention reason would constitute persecution.<sup>23</sup>

## 2.2 The Notion of Persecution within the British Courts

Within the British asylum system, the Court of Appeal cautiously adopted the 'human rights' approach in the case of *Ravichandran*.<sup>24</sup> Quoting Hathaway, Simon Brown LJ believed it to be 'instructive'.<sup>25</sup> This was reinforced in the case of *Blanusa*.<sup>26</sup> Schiemann LJ underscored the need for decision-makers to focus their analysis on the gravity of the invasion into a person's fundamental rights, examining the nature of the invasion and its length of time, for example.<sup>27</sup>

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<sup>19</sup> Hathaway (n 11) 111.

<sup>20</sup> Deborah Anker, *Law of Asylum in the United States* (3rd edn, Refugee Law Center, 1999) 177.

<sup>21</sup> *ibid* 176-177.

<sup>22</sup> *ibid* 179.

<sup>23</sup> *ibid* 178.

<sup>24</sup> *R v. Secretary of State for the Home Department, Ex Parte Ravichandran (No.1)* [1996] Imm AR 97.

<sup>25</sup> *ibid* [Simon Brown LJ].

<sup>26</sup> *R v. Secretary of State for the Home Department, Ex Parte Blanusa* [1999] ALL ER (D) 499.

<sup>27</sup> *ibid* (Schiemann LJ).

The adoption of the human rights approach was confirmed by the House of Lords decision in *Shah and Islam*.<sup>28</sup> Here, Lord Hoffman relied on Hathaway in directing assessments on persecution to be based on the ‘seriousness’ of the harm feared.<sup>29</sup> Also, he stripped Hathaway’s definition to its most essential components: ‘Persecution = Serious Harm + Failure of State Protection’.<sup>30</sup> As the agents of mistreatment in this case were not the Pakistani state, but the appellants’ husbands, Lord Hoffman argued that the serious harm feared was only transformed into persecution by the state’s failure to protect them.<sup>31</sup>

Hathaway’s definition gained more substance in the case of *Horvath*, where the House of Lords endorsed the basic conception of persecution advanced in *Shah and Islam*.<sup>32</sup> Lord Hope, relying on the judgment of Lord Lloyd in *Adan*, argued that the refugee definition could be construed as comprising of two main tests.<sup>33</sup> The first, the ‘fear’ test, described being outside one’s country of origin due to a well-founded fear for a Convention reason.<sup>34</sup> The second, the ‘protection’ test, described being unable or unwilling to rely on protection in their home country due to this fear. These two tests, he advanced, were bound together by the idea of ‘surrogacy’, i.e., that protection should only be granted by the asylum-receiving state when the home state fails its protection obligations.<sup>35</sup>

This remains the current position within the British asylum system, in conjunction with the guidance provided on persecution by Article 9 of the Qualification Directive.<sup>36</sup> The directive not only replicates Hathaway’s definition in Article 9(1)(a), but has also clarified that persecution can also exist where less serious, derogable

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<sup>28</sup> *Shah and Islam v. Secretary of State for the Home Department* [1999] 2 AC 629 [651] (Lord Hoffmann).

<sup>29</sup> *ibid* [653].

<sup>30</sup> *ibid*.

<sup>31</sup> *ibid* [654].

<sup>32</sup> *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489, [505] (Lord Lloyd).

<sup>33</sup> *ibid* [496-497] (Lord Hope).

<sup>34</sup> *ibid*.

<sup>35</sup> Hélène Lambert, ‘The Conceptualisation of “Persecution” by the House of Lords: *Horvath v. Secretary of State for the Home Department*’ (2001) 13(1/2) *International Journal of Refugee Law* 16, 18.

<sup>36</sup> Storey (n 1) 279.

rights have been infringed, and the accumulation of those infringements is sufficiently severe to meet the thresholds of persecution.<sup>37</sup> Article 9(2) provides a non-exhaustive list of the generalised kinds of acts that could constitute persecution, ensuring substantive clarity for decision-makers on how the thresholds could be met.

In line with the structural principles advanced in Chapter two, this section demonstrates the flexible and evolving understanding of how the fundamental rights of asylum-seekers ought to be protected, and for this purpose, how persecution ought to be defined. Grounding the persecution definition in human rights standards allows pragmatic application of the evidentiary thresholds, i.e., in terms of what constitutes persecution. This constitutes a focus on the impact of the maltreatment on a claimant's fundamental rights. Having clarified the working definition of persecution, the following section investigates whether the British asylum system recognises the persecutory impact of maltreatment unique to the sexual identity context.

### **2.3 Persecution in the Sexual Identity Context: Legal Sanctions Criminalising Minority Sexual Identities**

A frequent theme in LGB narratives of persecution is the escape from societies that criminalise certain expressions of minority sexual identity. Studies indicate that some 76 jurisdictions across the world maintain criminal sanctions against consensual same-sex sexual relationships.<sup>38</sup> Of these states, the death penalty is instituted within approximately seven states.<sup>39</sup> Other sanctions have also been instituted against LGB citizens by some states, e.g., outlawing same-sex marriages or homosexual propaganda.<sup>40</sup> The result is that legal sanctions are a pervasive tool by which many

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<sup>37</sup> 'Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted' (Qualification Directive) (30 September 2004) OJ L. 304/12-304/23, art 9(1)(b).

<sup>38</sup> Aengus Carroll and Lucas Paoli Itaborahy (International Lesbian and Gay Association (ILGA)), 'State-Sponsored Homophobia. A World Survey of Laws: Criminalisation, Protection and Recognition of Same-Sex Love' (*ILGA*, 8 May 2015) <[http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2015.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf)> accessed 21 May 2015.

<sup>39</sup> *ibid* 28. Brunei Darussalam will also introduce the death penalty in 2016.

<sup>40</sup> *ibid* 66, regarding Ugandan criminalisation of same-sex marriage and 32, regarding propaganda laws.

states systematically ‘other’ and cause harm to their LGB citizens.

In the British asylum system, the authority on treating such criminal sanctions is the Court of Justice of the European Union (CJEU) case of *X, Y and Z*.<sup>41</sup> This case concerns three asylum claims relating to a well-founded fear of persecution on grounds of sexual orientation, where the applicants were Sierra Leonean, Ugandan and Senegalese. In each case, the applicant appealed against the refusal of claims lodged in the Netherlands. Although X and Y’s appeals were successful, Z’s appeal failed, leading the Minister to lodge appeals against the successful outcomes of X and Y, and Z to appeal against his refusal. The CJEU was tasked with answering whether the ‘criminalisation of homosexual activities and the threat of imprisonment’ would constitute persecution under the Qualification Directive. The CJEU addressed the question by explaining that ‘the mere existence of legislation criminalising homosexual acts’ would not be serious enough to meet the thresholds of persecution.<sup>42</sup> If a term of imprisonment accompanying the law was actually applied in the country of concern, however, the legislation would be regarded as persecutory.<sup>43</sup> Therefore, decision-makers were guided towards making an ‘enforcement-centric’ analysis, focusing on the legislation’s implementation.<sup>44</sup>

This has been integrated into the British asylum system’s consideration of claims made on sexual identity grounds. Within the 2015 asylum policy instructions on ‘sexual identity issues’, the *X, Y and Z* case is cited, alongside the approach of the CJEU.<sup>45</sup> Caseworkers are advised to focus on ‘whether these legal provisions are applied in practice’. It is highlighted clearly that, first, the sanctions themselves must be of particular severity in order to meet the thresholds, ‘namely imprisonment rather than simply a fine’, and second, actual implementation is essential.<sup>46</sup> As a result, if sanctions are ‘never, or hardly ever imposed, a claimant cannot demonstrate a real

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<sup>41</sup> Joined Cases C-199/12, C-200/12 and C-201/12 *X, Y and Z v. Minister Voor Immigratie, Integratie En Asiel*.

<sup>42</sup> *ibid* [55].

<sup>43</sup> *ibid* [61].

<sup>44</sup> *ibid* [58-59].

<sup>45</sup> ‘API: Sexual Identity Issues’ (n 3) 10.

<sup>46</sup> *ibid* 10.



risk on this basis'.<sup>47</sup> The instructions also acknowledge that sanctions could be part of a list of fundamental rights violations that cumulatively meet the thresholds of persecution.<sup>48</sup>

This has been the broad approach of the Home Office even before the *X, Y and Z* decision. In the second of two Freedom of Information requests made as part of the empirical research in 2014, the Home Office was queried about its position on criminal sanctions in cases based on sexual identity grounds. Although the response pre-dates the CJEU decision and subsequent policy guidance, it reflects the consistency of the Home Office's attitude towards legal sanctions against LGB expressions of identity:

An individual could be removed to a country where, technically, homosexuality is a criminal offence but where, in reality, there is no real risk of persecution or of the authorities taking action against LGB people. However, if those laws are implemented and persecution results, then it would be likely that protection would be granted – if it is also accepted that the individual is LGB as claimed.<sup>49</sup>

The approach of the CJEU and of the British asylum system is problematic, however, because it fails to appreciate the connection between criminal laws and society with regard to persecutory treatment. In most countries, criminal laws, even if unenforced, reflect the society's fundamental intolerance of LGBT rights, as explained by Monaghan's comment on the Opinion of Advocate General Sharpston in *X, Y and Z*:

Criminal laws are connectedly *both* normative and punitive. They tell society what is acceptable and tell individuals what is not acceptable – they operate as a legal and social imperative not to do something, or, to be someone and

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<sup>47</sup> *ibid* 11.

<sup>48</sup> *ibid*.

<sup>49</sup> 'Freedom of Information (FOI) Request 31669', Home Office, Gender and Sexual Orientation Team (13 June 2014) 6-7 (question 26).

license society to express its disapproval through stigmatisation, prejudice and discrimination.<sup>50</sup>

Consequently, criminal sanctions, regardless of enforcement, provide state and non-state agents with the necessary legitimacy to persecute individuals of minority sexual identities. Superficially, state-imposed penalties merely provide agents with the direct tools of persecution. Indivisible from such legislation, however, is the transformation of the LGB individual into a culprit. Through this transformed status, state agents gain tacit approval to persecute individuals under the cover of ‘investigation’, using blackmail, harassment, extortion and arbitrary detention.<sup>51</sup> Moreover, the law grants non-state agents, such as families, peers and community members, permission to persecute, having perpetuated the ideology that sexual minorities are social and legal pariahs. For this reason, any abuse is seen to be deserved and will not be redressed by the state.<sup>52</sup> By fuelling this culture of hatred and impunity, the state is additionally complicit in the persecution of LGB people by agents that are not directly under its influence and control. The influence of the existence of criminal laws on the conduct of non-state agents, and the contribution of this to a persecutory environment was raised by one of the participants interviewed for this thesis:

But criminalisation is enough because this means that individuals in case of need cannot turn to the state or to state officials for their protection even if it is happening, the persecution or the violation of their fundamental rights by non-state actors, when their behaviour would be criminalised. So that this breeds an atmosphere of homophobia so that criminalisation is enough... (Lilian Tsourdi).

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<sup>50</sup> Karon Monaghan QC, ‘Case Comment: AG’s Opinion in *X, Y and Z v. Minister Voor Integratie En Asiel* (C-199/12, C-200/12 and C-201/12)’ (24 July 2013) <<http://eutopialaw.com/2013/07/24/case-comment-ags-opinion-in-x-y-and-z-v-minister-voor-immigratie-integratie-en-asiel-c%E2%80%9119912-c%E2%80%9120012-and-c%E2%80%9120112/>> accessed 21 May 2015.

<sup>51</sup> Sabine Jansen and Thomas P. Spijkerboer, ‘Fleeing Homophobia. Asylum Claims Related to Sexual Orientation and Gender Identity in Europe’ (*COC Nederland/VU University Amsterdam*, 2011) 26.

<sup>52</sup> ILGA Europe, ‘Statement on Pending Preliminary Rulings by CJEU Regarding Alleged Persecution on the Ground of Sexual Orientation’ (2 August 2012) <[http://www.ilga-europe.org/home/news/latest/statement\\_cjeu\\_august\\_2012](http://www.ilga-europe.org/home/news/latest/statement_cjeu_august_2012)> accessed 21 May 2015.

If unenforced criminal laws did not reflect societal opinion, they would be challenged and repealed. After all, between 2006 and 2015, 16 states decriminalised same-sex sexual acts.<sup>53</sup>

Furthermore, whilst criminal sanctions are unenforced, their mere existence maintains the danger that a change in government policy or societal attitude could reintroduce their application.<sup>54</sup> For example, in Malawi, colonial era laws were unenforced until January 2010, when two individuals were arrested and sentenced to 14 years of hard labour for ‘gross indecency’.<sup>55</sup> Similarly, Ugandan sodomy laws were unenforced until 2012, when the Ugandan parliament oversaw the introduction and passing of a bill seeking to increase the penalties for same-sex sexual activity and to introduce sanctions for those failing to report such activity.<sup>56</sup> In Zimbabwe, similar laws were also unenforced until President Mugabe’s increasingly homophobic rhetoric from 1998 onwards, which, amongst a litany of abuses, resulted in sexual minorities being arrested on exaggerated charges.<sup>57</sup>

A second problem with the Home Office’s approach is that an enforcement-oriented analysis is constrained by evidentiary difficulties. Decision-makers will too-often struggle to establish whether enforcement takes place. There is a problem of scarce objective information regarding the practice of certain states in matters pertaining to the rights violations of LGB individuals (section 4 below).<sup>58</sup> The practices of states are obviously incompatible with the evidentiary demands of the asylum system. For example, a state may not record its prosecutions under the norms against sexual

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<sup>53</sup> Carroll and Itaborahy (n 38) 25-26.

<sup>54</sup> Amnesty International, ‘Observations by Amnesty International and the International Commission of Jurists on the Case *X, Y and Z v. Minister Voor Immigratie, Integratie En Asiel* (C-199/12, C-200/12 and C-201/12) Following the Opinion of Advocate General Sharpston of 11 July 2013’ (2 October 2013) POL 33/003/2013, 7.

<sup>55</sup> Amnesty International, ‘Malawian Couple Sentenced to 14 Years Hard Labour for “Gross Indecency”’ (20 May 2010) <<http://www.amnesty.org/en/news-and-updates/malawian-couple-sentenced-14-years-hard-labour-gross-indecency-2010-05-20>> accessed 12 December 2013.

<sup>56</sup> Carroll and Itaborahy (n 38) 66.

<sup>57</sup> Human Rights Watch, ‘Letter to UN Human Rights Defenders Special Rapporteur Regarding Raid and Prosecution of Defenders in Zimbabwe’ (30 May 2010) <<http://www.hrw.org/news/2010/05/29/letter-special-procedures>> accessed 12 December 2013.

<sup>58</sup> Jansen and Spijkerboer (n 51) 71.

minorities.<sup>59</sup> It may prosecute individuals through alternative legislation to prevent the matter from coming to international attention. It may also use different court systems (such as military or sharia courts) to facilitate prosecutions. By overlooking these issues, the CJEU has reinforced the use of an imprecise and unmanageable approach in the British system, which invites inconsistency and unfairness into the RSD.

The practical and conceptual limitations of this approach arose within the empirical data. On several occasions, asylum-seeker participants were denied protection in connection to the Home Office failing to recognise the persecutory nature of criminal sanctions, in part, due to insufficient analysis:

They said the law in my country did not say gay or homosexual; the law said unnatural contact. This is the reason why they said the law is not valid [didn't apply to gay men] (MASY003).

The Home Office refused the asylum claim of MASY003, a Ghanaian gay man, contending that the laws in Ghana did not criminalise same-sex relations between two men. In Ghana, Chapter 6 of the Criminal Code 1960, as amended by the Criminal Code (Amendment) Act 2003, outlaws 'unnatural carnal knowledge'.<sup>60</sup> In MASY003's case, expert evidence was required at the appeal stage to identify the impact of this legislation upon LGB individuals. From one perspective, the decision-maker's reasoning in this case exemplifies the aforementioned evidentiary difficulties of establishing the use made of a law in a particular state. From another perspective, it exemplifies ignorant decision-making as the legislation is a remnant of British colonialism, which remains in force across the Commonwealth.<sup>61</sup> It is common knowledge that such laws apply to gay men.

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<sup>59</sup> *ibid* 26; UNHCR, 'Sexual Orientation Guidelines' (n 4) paras 20-1.

<sup>60</sup> See also, Carroll and Itaborahy (n 38) 55.

<sup>61</sup> Corinne Lennox and Matthew Waites, 'Human Rights, Sexual Orientation and Gender identity in the Commonwealth: from History and Law to Developing Activism and Transnational Dialogues' in Corinne Lennox and Matthew Waites (eds), *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth: Struggles for Decriminalisation and Change* (Human Rights Consortium, Institute of Commonwealth Studies, University of London, 2013) 1.

Arguably, a result of these evidentiary difficulties is the Home Office's shallow analysis of country situations. This is demonstrated in the case of MASY005, an Indian national whose claim for asylum was lodged and refused in 2013. From an assessment of the refusal letter that he provided for analysis, the Home Office's consideration of the criminal sanctions in India raises concerns about the quality of the decision-maker's determination:

Background information indicates that the Indian government did not oppose the Supreme Court ruling decriminalizing homosexuality within the Union territory of New Delhi, and actively distanced itself from statements made on their behalf calling for the ruling to be overturned (para 22.04 COIR India 30 March 2012). Furthermore, whilst Section 377 officially remains in force, background information confirms that it is rarely applied except when child abuse or rape is alleged. On this basis it is considered that any harm that you may fear on account of being gay is neither state sponsored nor state condoned, and therefore does not amount to persecution as per para 13 of HJ (Iran) [2010] UKSC 31.<sup>62</sup>

The Home Office cited information from Human Rights Watch that the decision to decriminalise homosexuality affected Delhi only.<sup>63</sup> It also cited the International Lesbian and Gay Human Rights Commission (ILGHRC), which explained that the Supreme Court would review the legality of the Delhi High Court's decision.<sup>64</sup> Despite the citation of such information, the caseworker treats the decision as decriminalising homosexuality across India.<sup>65</sup> Furthermore, the decision-maker treats the matter as settled, despite acknowledging that the Indian Supreme Court would review the legality of the decision. The caseworker is, therefore, unclear as to how to treat the developing legal situation in India with respect to the legal sanctions. As a safeguard of sorts, the caseworker emphasises that the law is rarely implemented,

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<sup>62</sup> MASY005, Reasons for Refusal Letter, page 15, para 97.

<sup>63</sup> *ibid* 12, para 95.

<sup>64</sup> *ibid* 13.

<sup>65</sup> *ibid* 12-14, paras 95-97.

which simultaneously and implicitly acknowledges that it is sometimes implemented. This determination is confused.

The assertion that the risk of persecution was negated by the Indian government's lack of opposition to the decriminalisation by the Delhi High Court is naive.<sup>66</sup> It fails to acknowledge the role played by non-state actors in the maltreatment of LGB people, as sanctioned by the prevailing legislation. It is notable that the caseworker copied and pasted substantial swathes of background information, but produced a small paragraph of analysis in relation to MASY005's circumstances, which is unsatisfactory in the light of the complexity of India's treatment of LGB people. The volume of objective information reproduced by the caseworker suggests that there are problems with the application of such information.

As a result of the caseworker's analysis, MASY005 was returned to India. Subsequently, the Indian Supreme Court reinforced the legitimacy of the legislation criminalising homosexuality.<sup>67</sup> NGOs have documented the increase in attacks against LGB people, establishing the clear connection between the legislation and mistreatment.<sup>68</sup> The Humsafar Trust indicated that reports of abuse have trebled since the reinstatement of the law.<sup>69</sup> By way of example, two policemen raped a gay man in Ahmedabad only weeks after the criminalisation was reinstated.<sup>70</sup> The decision in MASY005's case under the British system contrasts starkly with the American approach. In the US, a gay Indian couple were granted asylum, having credibly established the threat of violence they faced in India, a decision bolstered by the

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<sup>66</sup> *ibid* 15, para 97.

<sup>67</sup> Jason Burke, 'Indian LGBT activists outraged as supreme court reinstates gay sex ban' *The Guardian* (12 December 2013) <<http://www.theguardian.com/world/2013/dec/11/india-supreme-court-reinstates-gay-sex-ban>> accessed 20 November 2015.

<sup>68</sup> Nita Bhalla, 'Feature - Blackmail and Abuse: Gay Sex Ban in India Stirs Violence' (*Reuters*, 6 April 2015) <<http://www.reuters.com/article/2015/04/07/gay-rights-india-idUSL3N0WX28Y20150407>> accessed 21 May 2015.

<sup>69</sup> *ibid*.

<sup>70</sup> Anonymous, 'Gujarat Policemen Rape Gay Man in Ahmedabad' (*Gaylaxy Magazine*, 09 February 2014) <<http://www.gaylaxymag.com/latest-news/gujarat-policemen-rape-gay-man-in-ahmedabad/>> accessed 21 May 2015. The rape, taking place on 9 February 2014, is emblematic of the violence and harassment faced by the LGBT community in India. It is pertinent that the victim was allegedly recognised by the police from his participation in Ahmedabad Pride in December 2012, where the policemen had been stationed.

Indian Supreme Court's position.<sup>71</sup> Although the American decision took place after the Indian Supreme Court's decision, whereas MASY005's took place before, this comparison is still important, as the Home Office still refuses to acknowledge the persecutory nature of criminal sanctions.<sup>72</sup> Indian LGB asylum-seekers are still deprived of refugee protection in the UK.

The problem with the British system's approach to the criminalisation of minority sexual identities is its broad disregard for and/or failure to understand the human cost of criminal sanctions. The approach lacks fairness. It entrenches the discrimination faced by LGB asylum-seekers by neglecting to understand the practical realities for sexual minorities living under criminal sanctions. Regardless of their enforcement, the legacy of these sanctions is an atmosphere of subjugation and stigmatisation for LGB people. As a result, sexual minorities are forced to suppress the expression and exercise of numerous fundamental rights. These rights include those articulated by the Yogyakarta Principles, such as the right to security for sexual minorities and the right to be protected by the state against harm.<sup>73</sup>

Decision-makers remain ignorant of the fact that criminal sanctions do not solely restrict the sexual behaviour of LGB individuals. In the LGB context, criminal sanctions are unique due to their extensive and devastating impact upon countless basic and essential freedoms of sexual minorities. These laws influence the safety of LGB individuals in forming relationships and friendships, and finding community support.<sup>74</sup> They heighten the fear of being caught or identified, and leave people vulnerable to violence and extortion, compounded by the fear of reporting such matters to the police.<sup>75</sup> LGB individuals must exercise restraint in many ways

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<sup>71</sup> Sandip Roy, 'Asylum in USA for Indian Gay Couple: Sec 377 Ruling Swung Their Case' (*First Post*, 3 January 2014) <<http://www.firstpost.com/world/asylum-in-usa-for-indian-gay-couple-sec-377-ruling-swung-their-case-1320969.html>> accessed 21 May 2015.

<sup>72</sup> DV, 'I went straight way to UK home office for claim asylum. But got 7 month prison' (*Detained Voices*, 21 March 2015) <<https://detainedvoices.wordpress.com/2015/03/21/i-went-straight-way-to-uk-home-office-for-claim-asylum-but-got-7-month-prison/>> accessed 22 October 2015.

<sup>73</sup> International Commission of Jurists (ICJ), 'Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (March 2007) principle 5.

<sup>74</sup> UNHCR, 'Sexual Orientation Guidelines' (n 4) paras 26-27.

<sup>75</sup> *ibid.*

because of the threat posed by legislation criminalising their identities. This refers directly to the consensus within refugee law that expecting individuals to exercise discretion to avoid maltreatment is wrong, particularly given the psychological harm it causes.<sup>76</sup> (The matter of enforced concealment will be addressed in greater detail in section 2.5.) Outside of refugee law, international case-law has acknowledged the impact of criminal sanctions on the fundamental rights of LGB people, infringing their rights to private and family life.<sup>77</sup> Thus, regardless of their enforcement (or not), the legacy of these sanctions facilitates an intolerable climate in which LGB people must live.

The human cost of criminal sanctions is pertinently identified by MASY005, a research participant who had lived under legislation criminalising same-sex sexual relations. He identified the struggle to accept his sexuality whilst living under stifling conditions where his identity was stigmatised and where his core freedoms were suppressed:

[They say that gay sex is legal in India,] but the way that you can feel yourself, express yourself, you know, be open in public, you don't have that freedom. That's the main problem and for me, I took 10 years to deal with my sexuality, to come to terms with the fact that I am gay (MASY005).

The result is that the Home Office's 'enforcement' approach is unfair. It is inconsistent with the structural principles adopted in Chapter two, because it fails to treat the Refugee Convention as a 'living' document, applying the thresholds of persecution with the appropriate flexibility and understanding. It fails to accord criminal sanctions their appropriate seriousness, in the light of the fact that they mostly reflect state and societal intolerance, and legitimise the persecution of LGB people by non-state agents. As the mere existence of criminal sanctions constrains the core expressions of LGB individuals, constituting a severe attack on their fundamental rights, it is unfair for the British asylum system to follow an approach

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<sup>76</sup> *The National Coalition for Gay and Lesbian Equality et al v. the Minister of Justice et al*, CCT 11/98 (9 October 1998) (USA) [28] (Majority Opinion) and [107] (Concurring Opinion of Sachs J).

<sup>77</sup> *Dudgeon v. United Kingdom* (1983) 5 EHRR 573; *Norris v. Ireland* (1991) 13 EHRR 186; and *Modinos v. Cyprus* (1993) 16 EHRR 485.



centred on enforcement. Treating the terms of the Convention and the thresholds of persecution pragmatically would involve recognising that the mere existence of such laws constitutes evidence of persecution that is actively pursued or promoted by the state. The fairness of the British system could be improved by taking this approach to criminal sanctions.

The fairness of the enforcement approach is impaired further by its practical limitations and the failures of British decision-makers. Objective information will rarely provide the information required to make consistent and accurate decisions, a key requirement of the structural principles. Where information is available, UK decision-makers conduct the investigations into enforcement poorly, often lacking the ability to understand a country situation. Where information on the status of criminalising provisions is scarcer, these problems are exacerbated. Accordingly, there are problems with the availability of information, its citation and application, and the skills and training of decision-makers. As the enforcement approach has been supported by the CJEU, however, it has been cemented into the British system and will prove difficult to dismantle. Having examined the Home Office's reluctance to recognise how the mere existence of criminal sanctions can persecute LGB people, decision-making on other forms of persecution will now be investigated.

## **2.4 Psychological Harm as Persecution**

As criminal sanctions show, LGB individuals routinely experience psychological harm. This emanates from the suppression of their rights to express themselves freely and the constant fear of mistreatment, if identified. Psychological harm is also a product of the physical maltreatment commonly experienced by LGB individuals, such as arbitrary arrest and imprisonment, police beatings, rape and involuntary medical interventions, for example, which would normally meet the 'sufficient seriousness' requirement of the persecutory thresholds.<sup>78</sup>

For the purposes of understanding the maltreatment of LGB people in the asylum context, it is essential to link together the stigmatisation of minority sexual identities

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<sup>78</sup> James C. Hathaway and Jason Pobjoy, 'Queer Cases Make Bad Law' (2011) 44 New York University Journal of International Law & Policy 315, 321.

and psychological violence. Outside of the asylum paradigm, this has been widely researched and documented within Western countries. Generally, non-heterosexual identities are either ‘othered’ or considered ‘deviant’ in many societies across the world.<sup>79</sup> There are several reasons for this, including the minority status afforded by virtue of their population size, the gradual but slow recognition of the rights of sexual minorities, and the way in which LGB people defy stringent norms relating to the roles and duties of men and women.<sup>80</sup> Although societal reaction to non-conformity may differ according to the culture in question, LGB individuals recognise their difference and experience stigma in relation to it. After all, LGB individuals develop their identities within their society’s heteronormative value-system.<sup>81</sup> This stigmatisation is documented in Western countries. Experiences of ‘oppression, rejection, discrimination, harassment and violence have been shown to have negative physical and mental health effects’ on the lives of LGBT youth and adults regardless of whether they are raised in asylum-receiving or producing societies.<sup>82</sup> For example, LGBT youth are considerably more likely to attempt suicide, carry weapons, engage in substance abuse, and adopt risky sexual behaviour.<sup>83</sup> By way of further example, a study of gay men has highlighted the link between stigma and psychological harm, as internalised homophobia, stigmatisation and experiences of homophobic violence and discrimination have a deleterious impact on their mental well-being.<sup>84</sup>

The experiences of stigma are compounded in the refugee context. In many traditional asylum-origin states for LGB claimants, oppressive restrictions are imposed upon the daily lives of sexual minorities. Social spaces where they associate

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<sup>79</sup> UNHCR, ‘Sexual Orientation Guidelines’ (n 4) para 21.

<sup>80</sup> James D. Wilets, ‘Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective’ (1996) 60 Alb. L. Rev. 989, 991 and 1011.

<sup>81</sup> Sari H. Dworkin and Huso Yi, ‘LGBT Identity, Violence, and Social Justice: The Psychological Is Political’ (2003) 25(4) International Journal for the Advancement of Counselling 269-79, 272.

<sup>82</sup> Anthony R. D’Augelli, ‘Developmental Implications of Victimization of Lesbian, Gay and Bisexual Youth’ in Gregory M. Herek (ed), *Stigma and Sexual Orientation: Understanding Prejudice against Lesbians, Gay Men, and Bisexuals* (Sage, 1998) 187-210.

<sup>83</sup> Ian Rivers and Daniel J. Carragher, ‘Social-Development Factors Affecting Lesbian and Gay Youth: A Review of Cross-National Research Findings’ (November 2003) 17(5) Children & Society 374, 377.

<sup>84</sup> Ilan H. Meyer, ‘Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence’ (September 2003) 129(5) Psychological Bulletin 674-97.

are subjected to regular police raids, they are denied access to basic services unless they mask their identities and behaviour, and medical interventions can be used to ‘cure’ their sexualities.<sup>85</sup> Criminal sanctions can dictate the extent to which one can express an identity freely, framed by the constant fear of being identified as LGB and being mistreated on this basis. There are psychological harms caused by verbal, emotional, physical and sexual abuse, such as forced prostitution, forced heterosexual marriage, ‘corrective rape’, coercion and blackmail.<sup>86</sup> Shidlo and Ahola have documented the psychological impact of such suffering, highlighting that many LGBT asylum-seekers suffer from substantial mental health problems: ‘common diagnoses are depression, dissociative disorders, panic disorder, generalized anxiety disorder, social anxiety, traumatic brain injury and substance abuse’.<sup>87</sup> Thus, it is critical that decision-makers give proper consideration in RSDs to incidents of psychological harm with reference to the thresholds of persecution (both in isolation and combined with experiences of physical harm).

With regard to the attitude of the British asylum system, this issue is highlighted by the Home Office’s guidance on sexual orientation issues that was adopted in 2010.<sup>88</sup> Although this document was replaced by instructions on ‘Sexual Identity Issues in the Asylum Claim’ in February 2015,<sup>89</sup> the 2010 policy document governed the decision-making recorded within the empirical work. The 2010 document displays a broad absence of psychological harm from the conceptions of the Home Office. Commendably, the guidance recognises psychological harm as persecution: ‘lesser forms of physical and psychological harm that may constitute persecution include harassment, threats of harm, vilification, intimidation and psychological violence’.<sup>90</sup> Otherwise, the 2010 instructions, alongside the training materials used by the Home Office are silent on this matter. There is no further explanation on the nature of psychological persecution in the sexual identity context and/or how such matters

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<sup>85</sup> Dworkin and Yi (n 81) 271.

<sup>86</sup> Ariel Shidlo and Joanne Ahola, ‘Mental Health Challenges of LGBT Forced Migrants’ (2013) 42 *Forced Migration Review* 9.

<sup>87</sup> *ibid.*

<sup>88</sup> Home Office, ‘Asylum Policy Instruction: Sexual Orientation Issues in the Asylum Claim’ (5 October 2010).

<sup>89</sup> ‘API: Sexual Identity Issues’ (n 3).

<sup>90</sup> ‘API: Sexual Orientation Issues’ (n 88) 4.

should be addressed. As a result, there is no tangible framework for understanding how to treat psychological violence for the purposes of the thresholds of persecution.

The absence of a framework is significant when considering how common psychological harm is amongst LGB claimants. Amongst asylum-seeker participants within the empirical data, there were some instances of extreme psychological harm. Perhaps due to the stigma related to mental health, many were reluctant to discuss at length the psychological violence that they had suffered and continue to suffer. Nevertheless, 11 of the 20 participants identified some element of psychological harm in their narratives of persecution.<sup>91</sup> Within the data, female participants constituted the majority of those claiming to have suffered psychological violence, which may suggest a greater willingness amongst women to acknowledge such harm. The intersectional nature of this data alternatively indicates a greater manifestation of this kind of harm upon lesbian and bisexual women claimants. This is consistent with the dissimilar experience of persecution between LGB men and women. Women are often invisible in their societies or experience greater struggles to express themselves than gay and bisexual men, for reasons including their reduced mobility for socio-economic reasons and restriction to the private domain.<sup>92</sup>

It is testament to the seriousness with which psychological violence should be taken, however, that a female asylum-seeker from Morocco explained how psychological violence was her primary cause and motivation for seeking refuge in the UK:

Because I didn't, in some circumstances, I didn't feel myself. I didn't feel safe, not 100%, you know. I am not talking about physical abuse, but it was more like, well, psychologies, you know, psychology (FASY004).<sup>93</sup>

The seriousness of the psychological harms experienced amongst the empirical research participants was further demonstrated by the fact that their conditions had

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<sup>91</sup> MASY003; MASY005; MASY006; MASY008; FASY001; FASY002; FASY003; FASY004; FASY005; FASY007; and FASY009.

<sup>92</sup> Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22(2) *Journal of Refugee Studies* 195-223, 211-213.

<sup>93</sup> MASY004.

been medically diagnosed or were being treated by healthcare professionals. For example, FASY005, a woman from Uganda, identified that she was ‘under mental health’ and attended a hospital where she received ongoing care. FASY007, a lesbian also from Uganda, explained that she had been diagnosed with PTSD and depression. FASY001, a Gambian woman, described her first consultation with a GP in the UK. Worrying for her poor mental health, he immediately referred her for counselling. Amongst the participants, two acknowledged that they had attempted suicide and that this was a part of their narratives of persecution.<sup>94</sup> Furthermore, eight participants stated that they provided specialist medical evidence of the psychological harms experienced.<sup>95</sup>

In explaining the content of the reports, both male and female interviewees attested to the harms that they had and were still experiencing. FASY003, a Pakistani lesbian, was suffering from Obsessive Compulsive Disorder (OCD):

He asked me about my life and experiences and I told him how I had lived such a filthy life, sleeping with different kinds of men. I began to suffer from OCD, I used to feel that I was constantly dirty. Whenever I showered, I would not stop showering. So now I don’t shower often, because I feel like if I start I won’t stop. I wanted to wash my body to get rid of the dirt. They wrote all about that (FASY003).

MASY004, a gay man from Burkina Faso, spoke of the traumatic nightmares that he experienced on a recurrent basis:

The medical report said because the problem I have in my country, when I come here, even now, I still feel the same. I cannot sleep at night, sometimes when I’m sleeping, I see a lot of people come to me, trying to beat me, a lot of people with a knife, trying to kill me (MASY004).

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<sup>94</sup> MASY003 and MASY005.

<sup>95</sup> FASY002; FASY003; FASY005; FASY007; MASY004; MASY005; MASY006; and MASY008.

The absence of meaningful guidance for decision-makers on examining psychological harm is worrying. There is a foundation for according psychological harm its appropriate seriousness for the purposes of the thresholds of persecution. For example, the United Nations Convention against Torture (UNCAT) defines torture as ‘any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person (...)’.<sup>96</sup> Within the empirical data, a legal representative echoed the potentially persecutory nature of psychological harm:

I think there is an argument to say that where somebody’s mental health is going to be so impacted as a result of being in a society that’s so hostile, or in a family environment, whatever it is, you might not be able to say it is persecution, but you might be able to say it is an article 3 [ECHR] harm, because it’s inhumane (Liz Barratt).

Psychological harm can exist independently of physical harm. Often, however, psychological harm is connected to the physical harms included in a claimant’s narrative of persecution. By way of example, FASY002 was shot by a relative, and alongside MASY006, FASY005 and FASY007, had been a victim of sexual violence. FASY009, FASY005, FASY007 and FASY002 suffered extreme physical abuse, as a result of which scars on their body were documented in torture, or ‘medico-legal’ reports. FASY003 was forced into sex-work by the man who she had eloped with and married against her family’s wishes. Again, the female asylum-seekers, on the whole, experienced physical violence of greater severity, the reasons for which are explored in Chapter four.

Asylum-seekers explained the use of medical reports to situate the intersection between psychological and physical violence (see also Chapter four). In the empirical data, a practitioner explained the importance of medical reports to document how physical and mental harms were part of her client’s experience of being tortured:

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<sup>96</sup> UN General Assembly, ‘Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ United Nations, Treaty Series, Vol. 1465, p. 85 (10 December 1984), art 1.

I would be thinking very seriously about getting a psychological or psychiatric report to say, “Yes, this person is suffering from PTSD and that’s very likely, or given their experiences, that all fits together”” (Catherine Robinson).

In other words, psychological harm can give legitimacy to the experiences of physical harm.

Despite eleven participants identifying and evidencing experiences of psychological harm, seven of these were refused asylum by the Home Office. This suggests that decision-makers consistently fail to assess psychological violence in the RSD or neglect to treat it with the seriousness warranted. Again, the particular circumstances of MASY005 warrant further scrutiny. His GP found him to be suffering from depression and suicidal ideation.<sup>97</sup> MASY005 provided a discharge summary from the Community Mental Health Team and a copy of a report from his psychiatrist in India. The poor consideration given to these documents by the Home Office relates to its assessment of the country situation in India. In the Reasons for Refusal letter, the decision-maker denied that MASY005 would feel the need to hide his sexuality, negating the link between his suicidal ideation and his fear of return.<sup>98</sup> Furthermore, the psychological harm experienced in India by the claimant was dismissed. The Home Office asserted that MASY005’s medical documents showed he no longer felt suicidal. Consequently, his mental health problems did not meet the high thresholds of Article 3 ECHR.

Believing MASY005 not to suffer from suicidal ideation anymore represents the decision-maker’s simplification and ignorance of his poor mental health. There was no basis in his medical evidence for this conclusion. The Home Office supported its assertion with a statement from MASY005’s substantive interview: ‘(...) I am happy being homosexual and God don’t hate me anymore now because I can see that I am doing nothing wrong (...)’.<sup>99</sup> The Home Office’s interpretation of this statement is arbitrary, because MASY005’s suicidal ideation continued, and his mental health was

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<sup>97</sup> MASY005, Reasons for Reasons Letter, 16.

<sup>98</sup> *ibid.*

<sup>99</sup> *ibid.*

generally poor. In fact, he spoke of his continued desire to commit suicide when the Home Office and the tribunal refused his claim.<sup>100</sup> His apparent reconciliation of faith and sexuality would not suddenly and permanently negate or absolve his mental health issues. The Home Office's approach may also constitute a reluctance to afford medical reports from GPs and psychiatrists appropriate weight, reflecting the culture of disbelief examined in Chapter four.

Arguably, the British asylum system avoids assessing psychological harm within LGB asylum narratives for the purposes of meeting the thresholds of persecution. The overall approach is inconsistent, as the system acknowledges the incidence of psychological harm by recognising the persecutory impact of enforced discretion, but limits its recognition to this domain only. Furthermore, whilst the guidance acknowledges forms of psychological harm, within actual decision-making, the harms are ignored or undermined. This is unfair, and in conflict with the structural principles. These state that the fundamental rights of LGB people must be acknowledged by the system, that the provisions of the Refugee Convention should be understood flexibly, and the evidentiary thresholds applied pragmatically. LGB asylum-seekers experience a significant incidence of psychological harm, through enforced discretion, societal disapproval and physical harm. As severe psychological harm can breach their fundamental rights, especially to private life and health, the UK asylum system must recognise this in its policy, guidance and training. To do so, first, it must recognise that the fundamental rights of LGB asylum-seekers can be breached in these instances. Subsequently, the system must grant these breaches the appropriate severity and seriousness for the purposes of the thresholds of persecution. This can be done through better guidance and training on how subjugating the fundamental expressions of LGB people affect their psychological well-being, tying into procedural tools of the structural principles. The updated instructions of 2015, however, replicate the same guidance as in the 2010 counterpart.<sup>101</sup> This highlights the ongoing need to address psychological violence with greater substance in both the guidance and in training, to ensure it is reflected appropriately within the decision-making.

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<sup>100</sup> Interview with MASY005.

<sup>101</sup> 'API: Sexual Identity Issues' (n 3) 11.



Finally, as part of recognising the severity of psychological harm within sexual identity-based asylum claims, it is essential that the Home Office recognises the intersectionality of that experience within the community of LGB asylum-seekers. As the empirical data has found, the severity of psychological harm amongst LGB asylum-seekers is most severe amongst lesbian and bisexual women. This undoubtedly relates to the fact that more of the women within the empirical research had actually suffered from persecutory physical harm. Men were also more privileged than women along other intersectional issues, such as access to education, economic resources and escape routes. A fair system would incorporate an understanding of these nuances into its decision-making, thus producing fairer, higher quality decisions. Given that the 2015 instructions have not addressed issues of psychological harm meaningfully, however, this thesis believes that the treatment of such violence will not improve under the British asylum system. This critique is more resonant in conjunction with the examination of the procedural treatment of mental health matters in Chapter four.

Having found that the British asylum system fails to a great extent to view common tools to subjugate LGB people (criminal sanctions and psychological harm) as persecutory, the thesis subsequently investigates whether this and the problem of insufficient guidance is replicated across other types of mistreatment common in LGB asylum claims.

### **2.5 Discretion: A Concept Retained?**

Having examined the Home Office's treatment of the persecution experienced by LGB asylum-seekers, particularly in cases concerning the criminalisation of minority sexual identities and psychological harm, this section explores the expectations placed upon claimants regarding their mistreatment. A fundamental question exists within refugee law and the asylum determination: can claimants be expected to alter their behaviour to avoid mistreatment? In the LGB context, the expectation inherent in this question emerged as the 'discretion' requirement. The 'reasonable tolerability' test encompassed this idea, asking whether LGB persons could be 'reasonably expected' to tolerate the suppression of their sexual expression in their home society in order to

avoid maltreatment.<sup>102</sup> This accompanied the practice of decision-makers rejecting the protection claims of sexual minorities, asserting that, indeed, they could avoid the risk of persecution by ‘acting discreetly’ and concealing their identities upon their return home.<sup>103</sup>

During the period in which this discretion requirement was utilised within the British system, several participants of the empirical research (whose claims were initially determined before 2010, but were challenged for several years after) were denied protection on this basis.<sup>104</sup> The UKSC ended this practice in 2010. The case of *HJ (Iran)* concerned two gay men, HJ, an Iranian national, and HT, a Cameroonian national. Both appellants had sought asylum in the UK, but the Home Office and the tribunal refused their claims. Eventually, their cases were jointly considered before the Court of Appeal, which applied the ‘reasonable tolerability’ test and found that the claimants could be reasonably expected to tolerate discreet behaviour in their countries of origin. The appellants challenged this decision in the UK Supreme Court, which established that decision-makers were not entitled to refuse LGB claims on such grounds:

To pretend that it [homosexuality or bisexuality] does not exist, or that the behaviour by which it manifests itself can be suppressed, is to deny the members of this group their fundamental right to be what they are – of the right to do simple, everyday things with others of the same orientation such as living or spending time together or expressing their affection for each other in public.<sup>105</sup>

The decision was incorporated in Home Office’s 2010 instructions, along with the guidance of the UNHCR, explaining that ‘people cannot be required to behave

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<sup>102</sup> *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31 [6].

<sup>103</sup> UKLGIG, “‘Failing the Grade’ - Home Office Initial Decisions on Lesbian and Gay Asylum Claims’ (8 April 2010) 6. According to the report, 56% of all cases were refused on the basis of discretion.

<sup>104</sup> FASY001; FASY002; FASY003; and MASY003.

<sup>105</sup> *HJ (Iran)* (n 102) [11].

discreetly’.<sup>106</sup> The instructions integrate the five-point test advanced by Lord Rodgers in *HJ (Iran)* on how the RSD in claims based on sexual identity should be conducted, which is:

When an applicant applies for asylum on the ground of a well-founded fear of persecution because he is gay, the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality.

If so, the tribunal must then ask itself whether it is satisfied on the available evidence that gay people who lived openly would be liable to persecution in the applicant’s country of nationality.

If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.

If the applicant would in fact live openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living “discreetly”.

If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.<sup>107</sup>

This UKSC decision was rightfully praised for eradicating the discretion requirement in the guise of the ‘reasonable tolerability’ test.<sup>108</sup> It also had a significant impact upon decision-making in this area, whereby LGB cases that had and would generally be refused were now granted protection. Indeed, the empirical data highlighted that

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<sup>106</sup> ‘API: Sexual Orientation Issues’ (n 88) 12.

<sup>107</sup> *HJ (Iran)* (n 102) [82].

<sup>108</sup> S. Chelvan, ‘Put Your Hands Up (If You Feel Love)’ (2010) JCWI Bulletin 56, 63.

there was a ‘honeymoon’ period subsequently, before the focus of RSDs shifted to disbelief.<sup>109</sup>

There was about four months where everyone who went to see them [the Home Office], won. They basically needed nothing. They just went, well, I cannot do anything to be ‘discreet’. So long as they were from an obviously dangerous country, then they won. We had about 50 in four months, just like, we get about three or four a month and they just went woom, woom, woom, woom, woom (Erin Power).

Despite the justified praise, conceptually and practically, the UKSC decision is not without issue. Lord Rodger’s five-stage test advanced in *HJ (Iran)* does not eliminate discretion altogether. Here, only the two stages of the test are discussed, as the other stages are not directly relevant to this discussion. Instead, as it will now be explored, the test shifts the attention of the RSD to ‘openness’. Correspondingly, the assessment of LGB asylum claims still turns on behaviour.<sup>110</sup> First, Lord Rodgers’ test instructs caseworkers to query whether ‘the applicant is gay or someone who would be treated as gay by potential persecutors’.<sup>111</sup> This crystallises the conditions for the ‘culture of disbelief’ that exists in relation to LGB claims, whereby decision-makers insist on scrutinising a claimant’s self-identification. Indeed, the first stage of each claim invites decision-makers to scrutinise the genuine nature of LGB identities. Should these queries be negative, the entire claim of an LGB asylum-seeker subsequently fails. The question of whether a claimant is genuinely a sexual minority is an important one, but this thesis contends that the extent and nature of the scrutiny placed upon this in the sexual identity context is substantial and unique.<sup>112</sup> At the second stage, decision-makers must consider whether LGB people ‘living openly’ are

<sup>109</sup> Jenni Millbank, ‘From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom’ (2009) 13 (2-3) *The International Journal of Human Rights* 391-414.

<sup>110</sup> Janna Weßels, ‘*HJ (Iran)* and *HT (Cameroon)* – Reflections on a new test for sexuality-based asylum claims in Britain’ (2012) 24(4) *International Journal of Refugee Law* 815-839, 827.

<sup>111</sup> ‘API: Sexual Identity Issues’ (n 3), 27, citing para 82 of *HJ (Iran)* (n 102).

<sup>112</sup> For example, often race and nationality can be externally verified. Similarly, one’s religious views and political opinions can be verified by testing the claimant’s knowledge of them, for example, whereas sexual identity cannot. At most, there would be parallels between LGB claimants and asylum-seeking unaccompanied children, where age assessments can engender disbelief of the child’s status as a minor, and can be as problematic as the disbelief of sexual identity.

liable to persecution in the country concerned, before assessing whether the applicant would ‘live openly’ or ‘behave discreetly’ if returned.<sup>113</sup> The Home Office’s internal training on LGB cases supports this construction of the RSD. The materials include key paragraphs of *HJ (Iran)* as a handout and instruct trainees on how to conduct the examination according to the aforementioned test.<sup>114</sup>

There are a number of reasons as to why the approach of the British asylum system is troubling. The first criticism relates to the legal inconsistencies of the approach. The empirical data explains that the approach of the British asylum system from *HJ (Iran)* is ‘problematic in terms of compatibility’ with the standards of human rights and refugee law.<sup>115</sup> This argument is crucial, as the system has failed to acknowledge the inconsistency of its approach with the prevailing interpretation of refugee law. The Home Office was selective in its incorporation of the CJEU’s decision in *X, Y and Z*.<sup>116</sup> It adopted the guidance on criminal sanctions in its policy instructions, but ignored the guidance on discretion, where it stated that the question of concealment had no place within the RSD. Relying on its principles in the case of *Y and Z*<sup>117</sup> and on the European Court of Human Rights (ECtHR) case, *Salahadin Abdulla*,<sup>118</sup> the CJEU stated that decision-makers must only establish, on the circumstances presented, whether an applicant would ‘reasonably fear’ being subjected to persecution on the basis of their experiences.<sup>119</sup> This was in line with the terms of Article 4 of the Qualification Directive. With regard to the thresholds of persecution, no provision of the Directive (or of the Refugee Convention) allowed for harm to be avoided through restraint or concealment.<sup>120</sup> For this reason, LGB individuals could not be required to conceal themselves or exercise restraint in the expression of their

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<sup>113</sup> *HJ (Iran)* (n 102) [82] (Lord Rodgers).

<sup>114</sup> ‘Freedom of Information Request 27021’, Home Office, Families and Gender Team (9 October 2013) Appendix B, ppt 25.

<sup>115</sup> Interview with Lilian Tsourdi.

<sup>116</sup> ‘API: Sexual Identity Issues’ (n 3) 10-11; *X, Y and Z* (n 41) [73-74].

<sup>117</sup> Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v. Y and Z* [2012] [62-65] and [78-80].

<sup>118</sup> Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Salahadin Abdulla and Others v. Germany* [2010] ECR I-1493 [90].

<sup>119</sup> *X, Y and Z* (n 41) [73].

<sup>120</sup> *ibid* [74].

identities to mitigate the risk of serious harm. Therefore, it is unmistakably clear that scrutinising an individual's behaviour or conduct in this way is illegitimate regardless of the circumstances and has no foundation in refugee law.<sup>121</sup>

There are also conceptual difficulties with the approach, which have significant practical consequences for the RSD. First, Lord Rodgers' emphasis on the distinction between discretion and openness, and on the openness of a claimant's behaviour in their home society, is troubling. The UKSC decision has been rightfully criticised for its failure to remove discretion from the RSD altogether.<sup>122</sup> The decision also reflects decision-makers' ongoing preoccupation with the behaviour of sexual minorities instead of their identity and expression. This is highlighted by Lord Rodger's 'attempts to conceive the meaning of "discretion" at paragraph 63, and again at paragraph 77, concluding, "what is protected is the applicant's right to live freely and openly as a gay man"'.<sup>123</sup> Accordingly, despite the British asylum system's broad assertion that requiring or expecting a claimant to conceal their identities is inappropriate, it retains discretion and converts it into openness. 'Openness' forms the heart of its approach, whereby only 'open' LGB claimants deserve protection. Where a claimant does not live their identity sufficiently in the public domain, protection is denied. This is a subversion of refugee law.<sup>124</sup>

A behaviour-oriented analysis highlights an endemic problem of this asylum system more clearly: the poor understanding of sexual identity and persecution on this basis. What should be protected is the right of claimants to express their identity, irrespective of the domain (public or private) in which this takes place.<sup>125</sup> Openness is, to some extent, irrelevant to the asylum determination. Crucially, discreet experiences do not eliminate the existence of a 'real' risk of persecution. Potentially any expression, intentional or unintentional, even seemingly in the private domain,

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<sup>121</sup> *Y and Z* (n 117) [79].

<sup>122</sup> Weßels (n 110) 823-824.

<sup>123</sup> *ibid* 826.

<sup>124</sup> *Y and Z* (n 117) (Opinion of Advocate-General Bot) [92-101].

<sup>125</sup> Jenni Millbank, 'Gender, Sex and Visibility in Refugee Decisions on Sexual Orientation' (2003) 18(1) *Georgetown Immigration Law Journal* 71-110, 109-111.

could reveal an LGB person's identity and leave them vulnerable to serious mistreatment.<sup>126</sup>

Additionally, Lord Rodger's approach in *HJ (Iran)* categorises voluntary concealment for social reasons as not persecutory, making potentially erroneous assumptions about the threat of abuse and discrimination inflicted by social and family ties. It underestimates their psychological harm, as discussed in section 2.4 above, and underplays the role of the state in creating conditions where an individual is indirectly compelled to be discreet to maintain social harmony.<sup>127</sup> Criminal sanctions, in section 2.3 above, are an example thereof. The five-stage test in *HJ (Iran)* ignores the fact that assessing motives does not improve the quality of decision-making. A motive-oriented analysis provides LGB claimants with an additional hurdle to surmount.<sup>128</sup> This is unfair, constituting prejudicial treatment when the motives of other groups of asylum-seekers are not ascertained in the RSD. For example, decision-makers are not concerned with why potential claimants fight against dictatorships or insist on attending their places of worship.

Critically, this approach also ignores intersectional issues. It does not recognise those struggling with their identities or with the disclosure expected within the system. It is not flexible to the needs of the less educated or articulate, who may not be able to express their motives for the concealment of their sexualities. Where a legal representative recognises this and works against it, a claimant can still succeed, but representatives with less competent representation, or none at all, are unfairly prejudiced. Given the conceptual nature of the refugee definition, especially the thresholds of persecution, good legal advice and representation is essential to claimants overcoming the prejudicial hurdles placed ahead of LGB asylum-seekers.

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<sup>126</sup> Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly and on Equal Terms Is Not Bad Law: A Reply to Hathaway and Pobjoy' (2012) 44 (2) New York University Journal of International Law and Politics 497-527, 513.

<sup>127</sup> John Tobin, 'Assessing GLBTI Refugee Claims: Using Human Rights Law to Shift the Narrative of Persecution within Refugee Law' (2011-2012) 44 New York University Journal of International Law and Politics 447, 465.

<sup>128</sup> Weßels (n 110) 838.

This is linked with the practical and evidential challenges of the British approach. Within the empirical data, participants highlighted the challenges of the post-*HJ (Iran)* climate. Practitioners explained the increased role forced on legal representatives to evidence that a claimant would only act discreetly in his or her home society due to a fear of maltreatment, not social or familial pressure:

I think you've really got to explore properly with your client what they are actually saying, because – and this is, for instance, what I think about a really well thought-out statement, what a really detailed statement really does, is that for your average – not average – but for some people, if you say, 'Why can't you go back?' – often one of the first things in their head is how ashamed their family are and they would have to hide their sexual identity.... And you actually realise, if you give them a chance, that it's not them just saying, 'I would choose to be discreet because I feel a bit ashamed'. They're actually saying, 'If I were openly gay, these things would happen to me, and because of that, I won't be,' and therefore you actually are protected by *HJ (Iran)*. And I think the difference is actually quite small. I think it needs to be drawn out (Barry O'Leary).

This indicates the very real problem of helping claimants to articulate why they would act discreetly if returned to their home societies, especially where claimants are under-educated, struggle with their sexualities, or do not understand the evidentiary demands of the RSD. For claimants served by less experienced legal representatives, this could easily result in claimants being imputed as acting discreetly for non-persecutory reasons. For example, in MASY003's case, voluntary discretion was cited as a reason for denying him protection. The empirical data emphasised the tendency of the Home Office to erroneously read non-persecutory, voluntary discretion into the claimant's motives:

I was reading a determination from a client quite recently, he's from Gambia. It's accepted that he's gay but they've said, because he lives in the UK discreetly, because he lives with his home community in order to survive, he will act like that on return. So he's lost his case (Erin Power).



This approach was confirmed by the UKLGIG's independent empirical research. Describing this development as the 'New Discretion Test', the report explained that claimants were being asked leading questions during substantive asylum interviews to determine how 'out' they were.<sup>129</sup> Questions included, 'did you lead an openly gay or discreet lifestyle' and 'what changed in the way you express your sexuality when you moved to the UK'.<sup>130</sup> On this basis, the Home Office rejected the claim of a Malawian man in November 2011, arguing that 'there is nothing indicative in your evidence of how you chose to express your sexual orientation that would demonstrate that you would be at risk of persecution on return'.<sup>131</sup> Similarly, an immigration judge dismissed the claim of a Malawian woman in August 2010 for failing to 'come out' in the UK.<sup>132</sup>

Although decision-making uses Lord Rodgers' test to burden claimants with satisfying that they would not choose a discreet lifestyle voluntarily, the Home Office's decisions on this issue are poor and inconsistent on this issue. Decision-makers often failed to evaluate a claimant's motives for voluntary discretion with the necessary rigour:

I think this relies a great deal on a caseowner being able to really rigorously understand the dynamics that are at play here in the country of origin that we're talking about, the cultural and social dynamics, and maybe gender dynamics because that individual whose... If UKBA is going to argue that this person is going to be willing to be discreet about their sexuality in deference to their family, why is that the case? This is what we really need to think about. Is it because of the cultural, social and the gender dynamics in their country, and is that even acceptable? (Paul Dillane)

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<sup>129</sup> UKLGIG, "Missing the Mark" - Decision Making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims' (14 October 2013) 23-24.

<sup>130</sup> *ibid.*

<sup>131</sup> *ibid.*

<sup>132</sup> *ibid.*

Indeed, this quote shows that it is intersectional decision-making, once again, that is absent from the British asylum system, alongside familiar issues of training and decision-maker competence.

The approach of *HJ (Iran)* facilitates perplexing and inaccurate reasoning within both the Home Office and tribunals. In the Country Guidance case *LH and IP*, the judge described the claimant and his partner as ‘particularly discreet’: ‘very few people know of their sexual orientation and they do not make use of their freedom to go out and express their sexual orientation in public’.<sup>133</sup> This is irrelevant, distorting the examination of the risk of persecution, which refugee law has attempted to make as objective as possible. Their claim was rejected, with the Upper Tribunal contending that the appellants would live discreetly in Sri Lanka as they did in the UK, ‘in accordance with their preferences, not in order to avoid persecution’.<sup>134</sup> This is problematic, because the claimants would still be at risk of persecution, even if acting discreetly.

The British asylum system’s approach to discretion remains unfair. Although the UKSC held that enforced discretion would meet the thresholds of persecution, this statement alone is misleading. The actual approach fails to interpret the terms of the Refugee Convention with the pragmatism required by the structural principles. The idea that discreet behaviour negates the risk of persecution and claimant’s requirement of refugee protection is not eradicated by *HJ (Iran)*. Instead, the focus on behaviour in the form of ‘out-ness’ and the claimant’s motivation demonstrates that the discretion concept has been retained. This is unfair because claimants who are discreet to avoid maltreatment, but for various reasons do not expressly articulate the ‘acceptable’ reason for behaving so, are denied protection. Thereupon, the *HJ (Iran)* test can have precarious consequences for naïve or poorly represented claimants. Legal representatives have greater responsibility to explain why a claimant would act discreetly. They must connect this to the feared persecution, and away from the idea that discretion is somehow voluntary (which would result in claimants being refused protection). The guidance and the practice of the British asylum system

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<sup>133</sup> *LH and IP (Gay Men: Risk) Sri Lanka CG* [2015] UKUT 00073 (IAC) [124].

<sup>134</sup> *ibid* [134].

are thus unfair. They are inconsistent with the correct approach, which focuses on the risk of harm to LGB claimants, not on their behaviour. The existing approach is also discriminatory because applicants seeking protection on other grounds must not surmount such hurdles. Finally, the persistence of discretion logic within the claims of sexual minorities represents a failure to understand the breadth and expression of sexual identity. It overlooks how discretion encompasses a suppression of one's fundamental rights, to significant psychological detriment, and cannot be a part of the RSD.

Having concluded the investigation of issues pertaining to persecution, this chapter now examines whether LGB claimants can relocate within their home societies to avoid such mistreatment.

### 3. Internal Relocation in the Sexual Identity Context

Refugee protection is only granted where an individual is unable to receive proper protection within their state of origin. Given the 'surrogate' nature of refugee protection, it is necessary to examine whether an individual could live safely within another part of the home state. This is known as the 'internal flight' or 'internal protection alternative'. It is defined within Article 8(1) of the Qualification Directive as the process of establishing whether an asylum-seeker can live safely within another area of his or her country of origin, reducing the risk of persecution to below the threshold levels.<sup>135</sup> Where this is the case, protection from the asylum granting state will not be necessary.

The viability of internal relocation is established through an assessment of the 'reasonableness' of the proposed relocation.<sup>136</sup> Where it would not be 'unduly harsh'

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<sup>135</sup> Qualification Directive (n 37) art 8(1). This states, 'Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country'.

<sup>136</sup> *R v. Secretary of State for the Home Department, Ex Parte Robinson* [1997] 3 WLR 1162 [1169-1170], [1172-1173]. See also paragraph 3390 of the Immigration Rules (Chapter two).

or unreasonable for the applicant to move to another part of their country, asylum protection would be denied.<sup>137</sup>

The Home Office instructions restate the ‘reasonableness’ requirement advanced in the case of *Robinson*.<sup>138</sup> They also incorporate *HJ (Iran)* to emphasise that relocation can never be proposed when it relies upon an individual’s discretion to secure their safety. This is commendable; the instructions quote the case to underscore that in countries like Iran or Cameroon, an individual cannot relocate safely without fundamentally altering aspects of their behaviour, rendering the relocation unreasonable.<sup>139</sup> The training materials also explain how ‘it is unlikely that relocation will be arguable in a gay/lesbian claim. We cannot argue someone can go from one area where they are persecuted to another’.<sup>140</sup> By way of example, the training materials acknowledge the pervasiveness of prejudice across countries by referencing the UKLGIG’s description of Jamaica.<sup>141</sup>

The guidance is good, but not without issue. The training materials and instructions do not provide a clear direction for decision-makers on assessing relocation options. Furthermore, although the training states that relocation is unlikely to succeed unless objective information can establish a safe place for relocation, it tacitly reinforces that the ‘unreasonableness’ is for claimants to prove.<sup>142</sup> This potentially burdens LGB claimants with another hurdle to surpass and provides decision-makers with a ready-made ground to refuse claimants who have not proven their inability to relocate. The burden is rendered more onerous due to the problems with the availability of objective evidence in the LGB context, clarified in the following section.<sup>143</sup>

Nevertheless, despite these shortcomings, the Home Office’s approach to internal relocation has improved immeasurably, a distinct result of the UKSC decision in *HJ*

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<sup>137</sup> *ibid.*

<sup>138</sup> ‘API: Sexual Orientation Issues’ (n 88) 7.

<sup>139</sup> *ibid.*, referencing *HJ (Iran)* (n 102) [21].

<sup>140</sup> ‘FOI Request 27021’ (n 114) Appendix B, PPT 25/26.

<sup>141</sup> UKLGIG, ‘Failing the Grade’ (n 103) 5.

<sup>142</sup> ‘FOI Request 27021’ (n 114) Appendix B, PPT 26-28.

<sup>143</sup> *ibid.*

(Iran). Before the decision, the UKLGIG had found that 68% of the refusal letters analysed for the report had utilised the relocation alternative as the basis for refusing protection.<sup>144</sup> Within these cases, virulently homophobic and violent countries, such as Jamaica and Iran, were determined to contain safe areas to which LGB asylum-seekers could return.<sup>145</sup> By contrast, in September 2013, the UKLGIG found that 24% of the cases it analysed had cited the viability of internal relocation as a ground for refusal.<sup>146</sup> This represents great progress.

There is also considerable evidence of the tribunal's ability to make positive and nuanced decisions. The cases of *DW (Homosexual Men; Persecution; Sufficiency of Protection) Jamaica CG* and *SW (lesbians - HJ and HT applied) Jamaica CG* are prominent country guidance cases.<sup>147</sup> In both *DW* and *SW*, the prospect of internal relocation was dismissed as 'unduly harsh', acknowledging the prevalence of prejudice across Jamaica. As the risk of persecution arises even from the mere perception of one's sexuality, internal relocation was not a viable option.<sup>148</sup> The latter point was afforded particular importance in the challenges faced by lesbians, who would be 'the subject of speculative conclusions, derived both by asking them questions and by observing their lifestyle and unless they can show a heterosexual narrative, they risk being identified as lesbians'.<sup>149</sup>

In the 24% of cases where the UKLGIG found the viability of internal relocation to be cited by the Home Office, the decisions were still disconcerting. Countries such as the Philippines, Pakistan, Malaysia, Uganda, Trinidad and Tobago, Ghana and Egypt were deemed as countries within which LGB applicants legitimately could relocate.<sup>150</sup> Yet, five of these countries retain outright criminal sanctions against LGBT identities,

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<sup>144</sup> UKLGIG, 'Failing the Grade' (n 103) 5.

<sup>145</sup> *ibid.*

<sup>146</sup> UKLGIG, 'Missing the Mark' (n 129) 22.

<sup>147</sup> *DW (Homosexual Men - Persecution - Sufficiency of Protection) CG* [2005] UKAIT 00168; and *SW (Lesbians - HJ and HT Applied) Jamaica CG* [2011] UKUT 00251(IAC).

<sup>148</sup> *ibid DW (Jamaica)* [75]; and *SW (Jamaica)* [105-107(5)].

<sup>149</sup> *ibid, SW (Jamaica)*.

<sup>150</sup> UKLGIG, 'Missing the Mark' (n 129) 22.

negating internal relocation as a realistic alternative.<sup>151</sup> The state-sanctioned persecution of sexual minorities in Egypt and Uganda has been widely documented through the years, demonstrating the problematic nature of such decision-making.<sup>152</sup>

Assessing internal relocation in the sexual identity context is extremely challenging, as it is contingent on objective country information. The availability of relevant country information to establish the risk of persecution in LGB claims is an ongoing issue, and is explored in-depth in section 5 below. In the relocation context, objective evidence is often insufficient; such information is rarely gathered and produced with the intention of informing relocation decisions.<sup>153</sup> Seldom will reports consider the internal safety of particular areas and compare these with other locations for LGB people. Consequently, decision-makers resort to inaccurate, irrelevant and outdated evidence to establish the safety of particular areas. By way of example, in 2012, an immigration judge found that the Home Office decision-maker had relied on outdated case-law and information on Uganda dating back to 2008, despite the internal situation having changed significantly since then.<sup>154</sup> Additionally, in a Country Guidance case on Zimbabwe, the Upper Tribunal relied on and gave weight to evidence from Women of Zimbabwe Arise (WOZA).<sup>155</sup> There is no reason to suggest that their evidence would be credible or significant. Their work did not include LGBT activism, and there was no reason for believing that they would not hold views as prejudiced as the rest of the Zimbabwean society.<sup>156</sup>

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<sup>151</sup> Pakistan, Malaysia, Uganda, Trinidad and Tobago and Ghana retain colonial era Sodomy laws. Whilst Egypt does not retain these laws, it has utilised other legislation to prosecute LGBT people, such as those proscribing a 'violation of honor by threat' and 'practising immoral and indecent behavior'. See Carroll and Itaborahy (n 38); Human Rights Watch, 'Laws Affecting Male Homosexual Conduct in Egypt' (March 2004) <<http://www.hrw.org/reports/2004/egypt0304/9.htm>> accessed 29 May 2015.

<sup>152</sup> *ibid.*

<sup>153</sup> Nicole LaViolette, "'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity": A Critical Commentary' (2010) 22(2) *International Journal of Refugee Law* 173-208, 201.

<sup>154</sup> The Immigration Judge stated that 'I bear in mind the Appellant's representative submissions relating to the fact that the case law is out of date and the situation has changed in Uganda since 2008 when *JM (homosexuality: risk) Uganda CG* (2008) UKAIT 00065 was decided.' See UKLGIG, 'Missing the Mark' (n 129) 23.

<sup>155</sup> *LZ (Homosexuals) Zimbabwe CG* [2011] UKUT 00487 (IAC) [63-65].

<sup>156</sup> Colin Yeo, 'Zimbabwe Gay Guidance Case' (*Free Movement*, 31 January 2012) <<https://www.freemovement.org.uk/going-for-glory-part-1/>> accessed 19 May 2015

Within the empirical data, several of the asylum-seeking participants had been refused protection initially on the basis that they could internally relocate. Decision-makers had contended that FASY001 could relocate within Gambia, MASY005 could relocate within India, and FASY002 could relocate within Jamaica, without consideration of the practicalities:

How can I go back in Jamaica to live? So I was explaining to him that in Jamaica if a woman lives on her own and they do not see a man coming along the house to [visit] her, automatically they just know what she is. And my children are all grown up. I can't go and live with my children (FASY002).

Given the instructive nature of the *SW* decision cited above, it is alarming that at the time of interview, FASY002, a Jamaican lesbian, was still waiting to be granted protection after more than four and a half years. It is problematic that her claim had been refused on countless occasions and remains outstanding, despite the existence of a strong and unequivocal precedent. It suggests issues of administrative delay, a lingering resistance to implementing tribunal cases, or of decision-makers lacking the skills, knowledge or time to conduct an RSD with the thoroughness required.

The demarcation of such states as containing areas to where sexual minorities can relocate is also of concern. It relies on the idea that the social and cultural mores in capital cities or metropolises are sufficiently different to provide safety, without providing the research that sufficiently proves it. By contrast, experts have argued that whilst bigger cities may be more permissive, they do not necessarily provide 'safe havens'.<sup>157</sup> It also suggests that the Home Office caseworkers, for example, have neglected to conduct intersectional assessments of how a particular claimant would fare, despite the obligation within the policy guidance to consider the 'financial, employment, housing, logistical, social, cultural and other factors'.<sup>158</sup>

MASY005's refusal letter embodies these concerns, where the caseworker contended that relocation to larger Indian cities such as Mumbai, Bangalore or Kolkata was

<sup>157</sup> See Expert Evidence of Dr Courtney Shelayah in *1213081* [2014] RRTA 75 (28 January 2014) (Australia) [24].

<sup>158</sup> 'API: Sexual Identity Issues' (n 3) 26.

viable.<sup>159</sup> This was justified by asserting that these cities had ‘emerging’ gay movements, contained sizeable Muslim populations, and because speaking English would assist him in gaining employment. Yet, this fails to reflect an intersectional approach to the individual’s circumstances, as somebody vulnerable to discrimination on dual grounds, as a gay man and as a Muslim (in line with objective country information).<sup>160</sup> It also makes a superficial assessment of the prospect of relocation to larger cities, as highlighted above.

The Home Office’s approach in the case of MASY005 is not dissimilar to the Upper Tribunal’s assessment in a Country Guidance case on the risk to ‘same-sex oriented males’ in India.<sup>161</sup> In both, the claimants were denied protection on relocation grounds. The tribunal asserted:

[I]t would not, in general, be unreasonable or unduly harsh for an open same-sex oriented male (or a person who is perceived to be such), who is able to demonstrate a real risk in his home area because of his particular circumstances, to relocate internally to a major city within India.<sup>162</sup>

The British asylum system’s assessment of the relocation prospects within India contrasts with the approach of the Australian asylum system in the case of *1213081*.<sup>163</sup> Here, the Refugee Review Tribunal of Australia accepted the expert evidence on relocation options. It acknowledged that ‘he would not be able to live openly as a homosexual in India at any location, as if he did this would result in his ostracism and probable further harm’.<sup>164</sup> The expert witness had contended that there were no relocation alternatives that would reduce the risk of persecution across India to below the threshold levels:

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<sup>159</sup> MASY005, Reasons for Refusal Letter, page 15-16.

<sup>160</sup> *MD (same-sex oriented males: risk) India CG* [2014] UKUT 00065 (IAC) [44], citing US State Department Report for 2012 highlighting ‘continuing societal violence against persons with HIV and on religious grounds [generally against Muslims]’.

<sup>161</sup> *ibid.*

<sup>162</sup> *ibid.* See [e] of headnote or [174].

<sup>163</sup> *1213081* (n 157).

<sup>164</sup> *ibid* [25].



At the dominant social-cultural level across India, attitudes of fear, hatred and disgust regarding homosexuality intractably persist (...) lesbians and homosexuals remain at real and great risk of persecution in numerous forms ranging from extreme violence to economic endangerment.<sup>165</sup>

This shows the stark contradiction of relocation assessments between the two jurisdictions and the failure of the British decision-makers to take an intersectional approach to the analysis. It suggests that the British system has not been conducting internal relocation assessments with the necessary rigour, or again, in accordance with the caveats in the LGB training materials. With regard to India, particularly, it appears that emphasis is placed upon the positive changes occurring within a country in transition, such as the existence of local bars and clubs and NGOs supporting LGB individuals, whilst marginalising legitimate reasons for concern.<sup>166</sup> This seems to reflect a tendency to view progress from a Western lens.<sup>167</sup> It also suggests that political considerations, such as the perception of India as a place of democratic, economic and cultural progress influence relocation considerations. This supports the arguments developed on the use of objective information in section 4 below. More broadly, it is also symptomatic of determinations operating in the aforementioned ‘culture of disbelief’.

It is clear that the fairness of decision-making on internal relocation has improved, with reference to the structural principles advanced in Chapter two. The *HJ (Iran)* decision has made a significant contribution to protecting the fundamental rights of LGB persons and interpreting the internal relocation concept flexibly in the LGB context. Prior to this decision, internal relocation was used in conjunction with the discretion requirement to reject the claims of sexual minorities, a practice that has been mostly abolished.

Through tools of procedural fairness, the British asylum system has also been able to further address matters of substantive fairness. The guidance and training, therefore,

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<sup>165</sup> *ibid* [24].

<sup>166</sup> *MD (India)* (n 160) [117].

<sup>167</sup> Catherine Dauvergne and Jenni Millbank, ‘Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers’ (2003) 31 *Federal Law Review* 299-342, 336.

has been improved to reflect the principles of *HJ (Iran)*. In the February 2015 instructions, the Home Office further bolstered existing guidance with intersectional instructions. These related to the acute difficulties faced by women with regard to relocation, and the need to conduct individual assessments of relocation, in full consideration of a claimant's personal circumstances.<sup>168</sup> This is an extremely positive development.

Nonetheless, a spate of decisions at Home Office and tribunal level demonstrate an ongoing issue with making complex internal relocation assessments. This is especially so when assessing states in transition regarding the rights of LGB people. This suggests that the current guidance may be insufficient. The British asylum system should recognise that internal relocation options are rare in LGB cases, and mostly difficult to evidence. It should avoid carrying out internal relocation assessments in cases where they are not warranted, or cannot be undertaken satisfactorily. In the rare cases where it may be possible and appropriate to explore the option of relocation, real training should be offered on how this can be determined. This should reference a claimant's personal circumstances, the complexity of transitional societies and caveats relating to the availability of country information. Thus, the system must improve its training and recruitment of decision-makers, including judges, and work to understand and eliminate any reasons why decision-makers may avoid applying good guidance (such as bias or disbelief).

#### 4. 'Well-Foundedness': The Role of Country of Origin Information

The final part of the refugee definition's first clause requires the fear of persecution to be well-founded. 'Well-foundedness' contains an obligation upon the applicant to demonstrate a reasonable risk of being subjected to persecution at the hands of a state or non-state actor, due to the failure of state protection.<sup>169</sup> In refugee law, a subjective fear is not enough. Only genuine refugees are granted protection, so there must be an

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<sup>168</sup> 'API: Sexual Identity Issues' (n 3) 26.

<sup>169</sup> Daniel Wilsher, 'Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?' (2003) 15(1) *International Journal of Refugee Law* 68, 82.

objective verification of the claimant's fear.<sup>170</sup> As a result, objective information regarding the conditions in a claimant's country of origin plays an important role in verifying that the risk of persecution is 'real'. Objective information assists the RSD in several areas, on criminal sanctions and internal relocation, for example. For this reason, the efficacy of its use requires scrutiny, especially in the LGB context, where relevant and detailed information can be hard to obtain. An assessment of the 'well-foundedness' of the claim relates to the credibility process, which is divided into the role of the decision-maker to establish the credibility of a claim through objective evidence (as examined here), and the subsequent evaluation of subjective evidence submitted by the claimant (as examined in Chapter four). The conclusions drawn in each relate to one another and hinge on the application of the evidentiary thresholds.

As the Home Office produces its own COI reports, which lead the assessment of country situations in the British system, COI must be investigated from two perspectives. First, this section will examine the quality of the Home Office's COI reports and, secondly, the decision-making that utilises such information.

#### 4.1 The Quality of COI Reports

The Home Office internally produces COI reports for most countries, which focus on providing details on the country climate from a human rights perspective, for use in asylum and human rights related immigration issues.<sup>171</sup> Also, the Home Office's Country Specific Litigation Team produces Operational Guidance Notes (OGN), which 'provide an evaluation of the relevant country information, general asylum policies and caselaw'.<sup>172</sup> These provide guidance to decision-makers on how to determine claims made on common grounds of persecution.

Prior to *HJ (Iran)*, these documents had been criticised for being outdated, lacking detail regarding the persecution of sexual minorities, and containing poor or erroneous interpretations of country situations.<sup>173</sup> Practitioners within the empirical

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<sup>170</sup> Hathaway and Foster (n 14) 91-92.

<sup>171</sup> 'FOI Request 31669' (n 49) 3.

<sup>172</sup> *ibid* 4-5.

<sup>173</sup> UKLGIG, 'Failing the Grade' (n 103) 9.

data praised the gradual improvement of Home Office-produced COI reports over the years. This praise was contextualised, however, by the one-time absence of LGB issues from COI reports:

They've got so much better. I mean, you have to remember – we've gone from a state where – I mean, they didn't even refer to people, to lesbian and gay people, to now, some of them are really quite good (Barry O'Leary).

Dillane also commended the improvement of COI and OGN documents, particularly regarding the diversity of the sources used and the 'reasonable' way in which country climates were interpreted from the perspective of LGB people.<sup>174</sup>

Nevertheless, practitioners were still reluctant to rely on Home Office-produced reports, due to their perceived bias ('they often put in the stuff that's helpful to them' Catherine Robinson), their failure to show the 'true picture' in certain states (S. Chelvan), the delay in updating them (Erin Power), and the use of culturally ignorant or incorrect information:

I got angry about many years ago, other than the Pakistan reports I think it was as well, where they mixed paedophilia, the fact that certain Afghan communities, or certain Northern Frontier communities in Pakistan, older men will take younger boys. That is paedophilia; it is nothing to do with being gay. But that was used in an extract about tolerance in society, so it's about getting the context right, that's very important (S. Chelvan).

Thereupon, practitioners highlighted the importance of independent research to supplement the Home Office reports, and of testing the content of the Home Office information. This demonstrates, again, the heightened role to be played by legal representatives to address potential deficiencies of Home Office-produced COI.<sup>175</sup>

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<sup>174</sup> Interview with Paul Dillane.

<sup>175</sup> Interview with Barry O'Leary.

The Home Office should be praised for the improvements made to the quality of COI and OGN. These reports reflect an improvement in the diversity of information used, incorporating reportage from the news media, international and domestic human rights organisations, and governmental and non-governmental organisations.<sup>176</sup> They also reflect a concerted effort to include dedicated sections on LGB issues in each report.

The Home Office strives to ensure the accuracy of these reports through an internal and external verification process. Internally, policy officials and in-house legal advisors evaluate COI reports, and externally, they are produced with assistance from ‘Still Human, Still Here’, a coalition of organisations working on asylum issues.<sup>177</sup> The reports are also ‘evaluated by the Independent Advisory Group on Country Information (IAGCI), which makes recommendations to the Independent Chief Inspector of Borders and Immigration’.<sup>178</sup> The efforts of the Home Office to ensure the quality of their COI reports are impressive. Nonetheless, to reduce the scope for bias and inaccuracy, and to aid confidence in the relevance and accuracy of the reports, further improvements can be made. One option is the production of reports through a dedicated and independent body. This could also work to address any political dimensions to report-generation, as addressed in the following subsection.

#### **4.2 The Application of COI Reports and Policy Guidance**

As identified in the structural principles and section 2.3 on criminal sanctions, decision-makers may have accurate guidance at their disposal. Ensuring that they have the skills to apply it to the case before them is equally important, however. Consequently, exploring the application of COI in LGB claims is critical.

Within the British system, the Home Office instructions discuss COI in the context of specific issues, such as criminal sanctions, internal relocation and state protection.<sup>179</sup> It also explains that the absence of information on the persecution of LGB people

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<sup>176</sup> ‘FOI Request 31669’ (n 49) 3-5.

<sup>177</sup> *ibid* 5.

<sup>178</sup> ‘FOI Request 31669’ (n 49) 5.

<sup>179</sup> ‘API: Sexual Orientation Issues’ (n 88) 14.

does not mean that there is an absence of persecution against sexual minorities.<sup>180</sup> The instructions demonstrate some intersectional understanding in relation to female applicants, stating that ‘there may be very little evidence on the ill-treatment of lesbians in the country of origin’ and ‘the absence of specific legislation on lesbians in particular may be an extension of the general marginalization of women’.<sup>181</sup> This guidance is good, but basic, offering no practical instructions on interpreting COI in RSDs and on taking decisions when COI is unavailable.

The training provided to caseworkers on LGB issues mirrors this guidance. COI is only considered in relation to the above-mentioned issues, e.g., acknowledging that ‘it is unlikely that relocation will be arguable in a gay/lesbian claim’ (with the proviso that the COI must otherwise demonstrate a safe and reasonable place for LGB people to relocate to).<sup>182</sup> The training also advises new caseworkers against taking the unavailability of information as signifying the absence of persecution, particularly in the case of lesbians.<sup>183</sup> It provides no guidance on the role to be played by COI and how it must be used. Perhaps this is because such skills are covered in the foundation training (Chapter four).

There are some issues with the implementation of COI. First, the substantial importance given to COI in the RSD is hampered by the fact that the documents are mostly insufficient. This results in inappropriate uses of evidence, as described above. Decision-makers do not recognise that most NGO and COI reports are not written for use in asylum determinations.<sup>184</sup> For example, the US Department of State reports are generated for business travellers and are used as tools of foreign policy. Amnesty International reports are also perceived inconsistently, deemed objective by some, or as tools of advocacy by others.<sup>185</sup> Decision-makers often neglect to evaluate from where their information was obtained. The British asylum system has

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<sup>180</sup> *ibid.*

<sup>181</sup> *ibid.*

<sup>182</sup> ‘FOI Request 27021’ (n 114) Appendix B, PPT 25/26.

<sup>183</sup> *ibid* PPT 29.

<sup>184</sup> Natasha Tsangarides, ‘The politics of knowledge: an examination of the use of country information in the asylum determination process’ (2009) 23(3) *Journal of Immigration Asylum and Nationality Law* 252, 255.

<sup>185</sup> *ibid* 256.

previously used gay travel guides as evidence of thriving life for sexual minorities in asylum-producing states.<sup>186</sup> Yet, these guides are directed at foreign travellers, and do not address the threat faced by local sexual minorities. Therefore, even seemingly objective information has implicit goals that are not necessarily directed towards assisting the RSD. The asylum system should recognise these agendas within the production and use of COI, ensuring that they are accorded the appropriate value.

Indeed, MASY005's Reasons for Refusal letter provides an important example of these issues in practice. Section 2.3 above discussed the Home Office decision-maker's shallow sourcing and analysis of COI on the treatment of LGB persons in India. This points to problems within the asylum system regarding the use of accurate guidance (and understanding a country situation, particularly one in flux, like India's), and regarding the basic skills and training of the decision-maker. If caseworkers cannot make fair and accurate analyses in cases where information is available, one can only have limited confidence in their abilities where information is scarce.

There are also examples of how the Upper Tribunal has not considered how insufficient COI should affect the assessment of an LGB asylum claim. In *LH and IP*, the Tribunal accepted that the state had no interest in documenting abuses, that the main organisation in Sri Lanka, Equal Ground, was a small organization in a large population, and that abuse was underreported.<sup>187</sup> It found, nevertheless, that the claimed existence of a persecutory climate in Sri Lanka was not well-founded due to an inability 'to point to more than a few specific instances at or near the level of persecution'.<sup>188</sup>

Within the empirical data, Dillane raised a second issue regarding the application of COI. He praised the improvement of the COI and OGN documents, but pointed to his experience of decision-makers repeatedly failing to reference the COI or relevant OGN in refusal letters. This rendered it impossible to determine whether they had been applied during the RSD. In other cases, COI and OGN documents were outright

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<sup>186</sup> UKLGIG, 'Missing the Mark' (n 129) 23.

<sup>187</sup> *LH and IP (Sri Lanka)* (n 133) [111].

<sup>188</sup> *ibid.*

ignored by decision-makers. The claims of LGB people were rejected through the use of irrelevant or outdated sources, even where the guidance acknowledged the existence of a risk towards sexual minorities.<sup>189</sup> Dillane also contended that the mere application of OGN documents was not enough to address the issues in this area. In many cases, caseworkers needed to discharge their duties with greater rigour, due to the limited nature of the guidance in OGN documents and often within COI reports:

There's a great deal of responsibility on the caseowners to discharge their assessment of the country situation and the consequences, and that duty should bring with it the need to look further afield than simply just the COI report. I think that's important (Paul Dillane).

The criticisms raised by Dillane regarding the persistent disregard of decision-makers for COI at their disposal and the limitations of these sources echo issues present in other areas of the RSD, e.g., internal relocation. They give credence to the argument that LGB claims are affected by the 'culture of disbelief'.

This has intersectional implications. The UKLGIG and the Chief Inspector of Borders and Immigration identified the ongoing 'invisibility' of lesbians from COI, and its prejudicial impact upon lesbian and bisexual women applicants.<sup>190</sup> This again highlights the failure to conduct intersectional analyses and understand that the experiences of LGB people are not homogenous. This is despite the guidance already containing such advice. For example, on regular occasions decision-makers concluded that laws criminalising 'homosexuality' only affected gay men, whereas in fact, the laws can be used to persecute women in the same way.<sup>191</sup> By way of example, a judge criticised the decision-maker's one-dimensional assessment in a case concerning a Gambian lesbian in June 2013.<sup>192</sup> This supports the contention that simplistic analyses are a result of the failure to look at the country climate overall, or

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<sup>189</sup> Interview with Paul Dillane.

<sup>190</sup> UKLGIG, 'Missing the Mark' (n 129) 27; Independent Chief Inspector of the UK Border Agency, 'An Investigation into the Home Office's Handling of Asylum Claims Made on the Grounds of Sexual Orientation: March – June 2014' (October 2014) 31.

<sup>191</sup> *ibid* UKLGIG, 'Missing the Mark'.

<sup>192</sup> *ibid*.



a failure to look for evidence that the claimant's fear is genuinely held. It contributes to concerns regarding the skills of caseworkers to undertake such complex legal processes. It also supports the idea that the UK system operates a 'culture of disbelief' towards LGB claims.

The 'invisibility' of lesbians appears to be a structural problem within the British asylum system. This is demonstrated by the differential treatment of cases concerning lesbians under the country guidance system. With regard to Jamaica, there was a clear delay of six years between the tribunal cases assessing the risk to gay men in the country and the assessment regarding lesbians or bisexual women.<sup>193</sup> The prejudicial delay involved in the production of guidance for sexual minority women is further highlighted by the fact that a country guidance case on 'same-sex oriented males' in India was determined in January 2014.<sup>194</sup> At the time of writing, a country guidance case for Indian lesbians was reported two years later.<sup>195</sup> This is not acceptable, given that information in cases of sexuality minority women is acknowledged to be scarcer, and thus, a greater priority. To combat this, a more comprehensive effort must be made to assess objectively the conditions for lesbian and female bisexual applicants. Prioritising the country guidance cases that explore the objective risk faced by sexual minority women is one potential measure. Doing so would help to address the significant barriers faced by women in establishing that their fear of persecution is well-founded.

This reluctance amongst Home Office decision-makers to consider COI appropriately was also found amongst country guidance cases in the Upper Tribunal. Too often, the evidence offered by an expert witness is undermined, or accorded less weight in favour of the 'superior' understanding of the decision-maker.<sup>196</sup> In *MD*, the legitimacy of the evidence given by Dr Akshay Khanna, Research Associate at the University of Sussex, was challenged for his 'sympathy' and 'avowed support for the rights of such persons'.<sup>197</sup> Yet, there was no suggestion in his work that he could not

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<sup>193</sup> *ibid*; *DW (Jamaica)* and *SW (Jamaica)* (n 147).

<sup>194</sup> *MD (India)* (n 160).

<sup>195</sup> *AR and NH (lesbians) (CG)* [2016] UKUT 66 (IAC) (1 February 2016).

<sup>196</sup> Colin Yeo (ed), 'Country Guidance Cases: Benign or Practical?' (*IAS*, 2005) 117-125.

<sup>197</sup> *MD (India)* (n 160) [111].

(and, indeed, had not) written or commented objectively, or that the tribunal had superior evidence or understanding. Where appropriate, Dr Khanna acknowledged the absence of evidence on particular issues.<sup>198</sup> By contrast, tribunals continued to rely on inappropriate evidence to determine that the states in question were safe, as pointed out in the UKLGIG report in 2010 and again in 2013.<sup>199</sup> The Upper Tribunal did so in *LH and IP*, affirming the safety of gay men in Sri Lanka, given that ‘holidays are openly and freely marketed on a gay friendly basis’.<sup>200</sup> This reliance on inappropriate evidence is further supported by the exploration of the Upper Tribunal’s reliance on evidence from a women’s organization to document the climate for sexual minorities in Zimbabwe in *LZ*, as discussed in section 3 above.<sup>201</sup>

Essentially, this reflects the resistance or failure of decision-makers to apply the evidentiary thresholds appropriately. For example, the Upper Tribunal in many cases have applied the ‘reasonable degree of likelihood’ test too stringently, failing to appreciate that in cases where there is insufficient information, the ‘benefit of the doubt’ must be extended to the claimant. In the case of *OO*, despite admitting that its perception of the choices made by gay men in the country of origin was on the basis of ‘limited evidence’, the Tribunal found that Algeria was safe for gay men who concealed their sexualities because of societal disapproval.<sup>202</sup> As stated earlier, the burden of proof in asylum claims mandates that there be a ‘reasonable basis’ for believing in the harm feared. The tribunal recognised there was insufficient COI available and still decided that the ‘reasonable degree of likelihood’ was not met and the ‘benefit of the doubt’ should not be extended.<sup>203</sup> This finding is troubling.

The failure to properly apply the evidentiary thresholds was also demonstrated by the case of *MD*. Despite the expert witness pointing out that prosecutions rarely made their way to higher courts (hence not being sufficiently known), the Upper Tribunal

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<sup>198</sup> *ibid* [30].

<sup>199</sup> UKLGIG, ‘Failing the Grade’ (n 103) 9; ‘Missing the Mark’ (n 129) 23.

<sup>200</sup> *LH and IP (Sri Lanka)* (n 133) [90].

<sup>201</sup> *LZ (Zimbabwe)* (n 155) [63-65].

<sup>202</sup> *OO (Gay Men: Risk) Algeria CG* [2013] UKUT 00063 (IAC) [80 and 83].

<sup>203</sup> Satvinder Juss, ‘Sexual Orientation and the Sexualisation of Refugee Law’ (2015) 22(1) *International Journal on Minority and Group Rights* 128-53, 139.

found, ‘given the complete absence of evidence before us capable of leading us to a contrary conclusion, that such prosecutions are rare and have always been so’.<sup>204</sup> It also placed great emphasis on the ability of NGOs to support LGB individuals and sufficiently document abuses to paint a full picture of the country climate for asylum purposes.<sup>205</sup> This attitude also ignores the difficulties for LGBT organisations, which are often small and underfunded, to conduct all the work expected of them within environments that are hostile towards sexual minorities.<sup>206</sup> Indeed, collating data for use in asylum claims is not a priority.

The Home Office’s 2015 instructions on sexual identity issues enrich the guidance on COI. The instructions explain that discriminatory or oppressive environments lead to a lack of information on the way that LGB people are treated.<sup>207</sup> This affects the ability of claimants to substantiate their claims objectively. It also instructs decision-makers to be aware of country conditions for LGB people before interviewing claimants, such as the visibility of LGB people, the prevailing norms within the society and the legal status of sexual minorities. This is extremely useful advice. The instructions point out that gay-friendly travel guides do not necessarily translate into welcoming attitudes towards LGB locals.<sup>208</sup> Where there is no information available on a specific country, caseworkers are told to make specific research requests to the Country Policy and Information Team.

The improvement of the instructions on COI issues (and on the aforementioned associated areas) is to the credit of the Home Office. One hopes that the advice is implemented by caseworkers in the future consideration of LGB claims. Addressing how COI should be evaluated and applied could develop the instructions further. For example, the guidance provided by the ECtHR is enlightening:

In assessing such material, consideration must be given to its source, in particular its independence, reliability and objectivity. In respect of reports, the authority

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<sup>204</sup> *MD (India)* (n 160) [131].

<sup>205</sup> Dauvergne and Millbank (n 167) 309-312.

<sup>206</sup> LaViolette, ‘Critical Commentary’ (n 153) 204.

<sup>207</sup> ‘API: Sexual Identity Issues’ (n 3) 12.

<sup>208</sup> *ibid* 13.

and reputation of the author, the seriousness of the investigations by means of which they were compiled, the consistency of their conclusions and their corroboration by other sources are all relevant considerations.<sup>209</sup>

Therefore, the fairness of the British asylum system's approach to COI is mixed. Whilst procedural fairness tools such as guidance and training have been well employed to provide some good guidance and direction, these have not necessarily translated into fair decision-making. The main issue here stems from the reluctance or inability of decision-makers to engage with the correct evidentiary standards, resulting in decision-making that is unfair, in line with the structural principles. The critique of this section is given further support by the fact that the Independent Chief Inspector has also identified problems with COI with regard to claims raised on all grounds.<sup>210</sup> This suggests that the issues with COI are endemic within the British asylum system overall.

It may be that the fairness of current decision-making can be improved through clearer guidance on using COI which corroborates the plausibility of a claim: where information is not available or reliable, the claimant must be given the 'benefit of the doubt'.<sup>211</sup> In such cases, the claim should be decided on the strength of the testimony alone. As there often appears to be no obvious engagement with the 'benefit of the doubt' principle, there remains scope for the quality of COI assessments to be improved further. Decision-makers must understand that there need only be a 'reasonable basis' for believing that a risk of persecution exists. To reduce or eliminate decision-maker arbitrariness, and the inflated role of COI, it is critical that the evidentiary thresholds be properly understood and applied. Refusing to grant deserving claims protection by disengaging with the evidentiary standards, however, also suggests that the 'culture of disbelief' dictates the determination of LGB claims rather than their merits.

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<sup>209</sup> *NA v. United Kingdom*, App no. 25904/07 [2008] ECHR.

<sup>210</sup> Independent Chief Inspector of the UK Border Agency, 'The Use of Country of Origin Information in Deciding Asylum Applications: A Thematic Inspection: October 2010 - May 2011' (July 2011) 5 <<http://icinspector.independent.gov.uk/wp-content/uploads/2011/02/Use-of-country-of-origin-information-in-deciding-asylum-applications.pdf>> accessed 29 May 2015.

<sup>211</sup> UNHCR Handbook (n 2) paras 203-204.

Finally, given the invisibility of women in COI assessments, decision-makers must properly grasp the breadth of the lives of sexual minorities in their countries of origin. They should appreciate the way in which the suppression of sexual minorities' identities engages with their fundamental rights. They should also encourage the ongoing production of guidance to assist in these claims, particularly for the most marginalised, e.g., lesbian and bisexual women.

It is now important to address the second part of the refugee definition, in terms of the identity that motivates the risk of persecution.

## 5. Membership of a 'Particular Social Group'

Recognising sexual identity as the valid subject of an asylum claim has been a slow and protracted process across all traditional asylum-receiving jurisdictions. The UK now possesses high standards of protection for LGB refugees, but it was extremely reluctant to recognise sexual minorities as legitimate subjects of refugee law in their own right.<sup>212</sup> This section outlines the process of recognising LGB claims in traditional asylum-receiving states and then in the UK specifically. Subsequently, it investigates the British approach to LGB claimants establishing that they are members of a social group that is at risk of persecution in their home society.

### 5.1 The Recognition of Sexual Identity as a Social Group in Alternate Jurisdictions

The Refugee Convention's absence of express reference to sexual identity as a ground for claiming asylum, and the failure of Convention drafters to reference it within the *travaux préparatoires*, ensured the sluggish progression of recognition.<sup>213</sup> This was illustrative, surely, that Convention drafters would not have conceived sexual

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<sup>212</sup> Derek McGhee, 'Persecution and Social Group Status: Homosexual Refugees in the 1990s' (2001) 14(1) *Journal of Refugee Studies* 20-42.

<sup>213</sup> United Nations High Commissioner for Refugees (UNHCR), 'The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis' (1990).

minorities as a community that required, or were deserving of, protection.<sup>214</sup> Although LGB people were also persecuted in the context of the Holocaust, to which the Convention was a response, most of the states involved in drafting the Refugee Convention maintained criminal sanctions against same-sex sexual relations, similar to those addressed in section 2.3, and/or treated same-sex sexual attraction as a disease.<sup>215</sup>

Whilst drafting the Convention, the Swedish delegate argued for the inclusion of a broad and general category, which would allow protection to be granted to individuals persecuted on grounds not conceived at the time.<sup>216</sup> Indeed, this is testament to the ‘living’ nature of the Refugee Convention, as outlined in the structural principles of Chapter two.<sup>217</sup> Accordingly, the ‘Particular Social Group’ (PSG) category was included alongside race, religion, nationality, and political opinion to provide the flexibility and expansiveness aimed by the Convention.<sup>218</sup>

It is due to the flexibility provided by the PSG category that LGB individuals were eventually recognised as the legitimate subjects of an asylum claim. This first took place in the American context in the 1985 case of *Matter of Acosta*.<sup>219</sup> In finding that Salvadorian taxi drivers formed a PSG, the Board of Immigration Appeals regarded the *ejusdem generis* doctrine, i.e., being ‘of the same kind’, to be instructive in illuminating that groups sharing a significant commonality could use the PSG ground to lodge refugee protection claims.<sup>220</sup> This common attribute was characterised by its immutability, i.e., an attribute that one could not change and should not be required to change.<sup>221</sup> This highlights a focus on the internal characteristics for a social group

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<sup>214</sup> *Applicant A v. Minister for Immigration and Ethnic Affairs* [1997] 4 LRC 480 [541] (Kirby J) (Australia). Kirby J also argued that in the light of the evolved social context, ‘different content and application’ of the Convention was required.

<sup>215</sup> For example, section 11 of the Criminal Law Amendment Act 1885.

<sup>216</sup> UNHCR, ‘Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees’ (April 2001) para 16.

<sup>217</sup> Goodwin-Gill and McAdam (n 5) 119.

<sup>218</sup> *ibid.*

<sup>219</sup> *Matter of Acosta* 19 I&N Dec. 211 (BIA 1985) (USA).

<sup>220</sup> *ibid* [233].

<sup>221</sup> *ibid.*

defined by sexuality, which was supported by the subsequent US case of *Matter of Toboso-Alfonso*.<sup>222</sup>

The internal nature of the characteristic defining sexual identity was contradicted one year later. In the case of *Sanchez-Trujillo*, the 9<sup>th</sup> Circuit Court of Appeal concentrated on external characteristics, namely, ‘voluntary associational relationship[s]’ that were fundamental to one’s identity as a member of that given social group.<sup>223</sup> To satisfy the nexus with the PSG ground (the ‘causal connection’ between the risk of persecution and the basis on which it occurs), the Court held it necessary for the group concerned to be ‘cognisable’ within society.<sup>224</sup> This prioritises the status of one’s identity within society over the identity itself, highlighting the competing internally and externally characterised tests for defining PSG. In the case of *In Re Tenorio*, despite being considered only months after the seminal Canadian case of *Ward* (explored below), Leadbetter J chose to fuse the two tests together, applying both the immutable characteristic of *Acosta* and the social perception element of *Sanchez-Trujillo*.<sup>225</sup> This development may have impacted the British asylum system, as explored in section 5.2 below.

In Canada, the Supreme Court endorsed the internally focused ‘protected characteristics’ approach in the case of *Ward*.<sup>226</sup> La Forest J opined that individuals could only access refugee protection if the social group membership which motivated their mistreatment was classified by one of the three definitions: first, groups defined by their shared innate or immutable characteristics; secondly, the voluntary association of members for reasons so fundamental to their human dignity, they should not be forced to forsake them; or thirdly, groups which are associated together due to their former voluntary status, but are not unalterable due their historical permanence.<sup>227</sup> Due to the clear and flexible definitions it provided, *Ward* was an influential decision. The judgment provided by the Canadian Supreme Court in *Ward*

<sup>222</sup> *Matter of Toboso-Alfonso* A23 200 644 (Feb 3 1986), reviewed by BIA (Mar 12 1990) [822] (USA).

<sup>223</sup> *Sanchez-Trujillo v. INS* 801 F. 2d 1571 (9th Cir. 1986) [25] (USA).

<sup>224</sup> *ibid* [19].

<sup>225</sup> *Matter of Tenorio*, No. A72-093-558 (IJ July 26, 1993) (USA).

<sup>226</sup> *Canada (AG) v. Ward* [1993] 2 S.C.R. 689.

<sup>227</sup> *ibid* 7-8.

has proven to be particularly instructive for the British asylum system, influencing its eventual recognition of LGB individuals as being capable of making asylum claims.

## 5.2 The British Approach to Sexual Identity and ‘Particular Social Group’

As stated above, the British asylum system was reluctant to recognise sexual minorities as the potential subjects of asylum claims. In the 1990s, the British system actively avoided recognising LGB individuals as potential refugees, despite lagging behind the progressive approaches towards PSG in the Canadian and American jurisdictions.<sup>228</sup> For example, in the case of *Golchin*, the tribunal justified its refusal to recognise ‘homosexuals’ as a PSG by arguing that their group membership was voluntary and socially inconspicuous.<sup>229</sup> Genuine sexual minority groups had no choice in the way that the Judiciary portrayed their identities. In the case of *Binbasi*, the tribunal cited the allegedly ‘voluntary’ nature of LGB individuals’ vulnerability to persecution, and their ability to exercise self-control to prevent their mistreatment as a reason for denying recognition (an early incarnation of the discretion argument).<sup>230</sup> Gay men could alter their own behaviour to avoid persecution, whereas the PSG category protected those who could not change their identities.<sup>231</sup>

The 1995 case of *Vraciu*, however, inadvertently led to the recognition of ‘homosexuals’ as a PSG within the British asylum system.<sup>232</sup> The adjudicator argued that protection was inappropriate. The claim was based on the ‘general’ persecution of ‘homosexuals’ within Romania, rather than their ‘personal’ persecution.<sup>233</sup> This was an admission that, in the right circumstances, sexual identity could form the subject of an asylum claim, representing an unintentional, but significant step towards protecting LGBs fleeing persecution.<sup>234</sup>

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<sup>228</sup> Jenni Millbank, ‘A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989–2003’ (2005) 14(1) *Social & Legal Studies* 115–138, 116.

<sup>229</sup> *Golchin v. Secretary of State for the Home Department* (7623) (1991, Unreported).

<sup>230</sup> *R v. Secretary of State for the Home Department, Ex Parte Binbasi* [1989] Imm AR 595.

<sup>231</sup> McGhee (n 212) 29.

<sup>232</sup> *Vraciu* IAT (11559) (1995, Unreported).

<sup>233</sup> McGhee (n 212) 29.

<sup>234</sup> *ibid.*



In 1998, a Romanian man, Sorin Mihai, was granted refugee status in the UK.<sup>235</sup> This was justified on the grounds that he was a ‘practising homosexual in Romania’ and, as a member of this PSG with a well-founded fear of being persecuted if returned there, his plight was considered deserving of protection. At court-level, this was followed by the case of *Shah and Islam*, where, although the comments were obiter, i.e., not part of the judgment addressing the circumstances of the case, three Law Lords accepted that ‘homosexuals’ could also constitute a PSG.<sup>236</sup> Explaining this recognition in *Shah and Islam*, Lord Steyn relied on cases from other asylum-receiving jurisdictions, such as *Acosta*, *Ward*, and the New Zealand decision of *Re GJ*,<sup>237</sup> endorsing the internal, protected characteristics approach over the external, social perception test of *Sanchez-Trujillo*.<sup>238</sup> In fact, Lord Steyn specifically avoided the *Sanchez-Trujillo* social perception approach, as he regarded the protected characteristics approach to be less restrictive and more inclusive of sexual minorities. Appropriately, he argued that social perception was not an appropriate requirement in this area, given that homosexuals ‘are, of course, not a cohesive group’.<sup>239</sup> This rationale is significant to this thesis’ appraisal of the subsequent development of PSG within the British asylum system.

Although *Shah and Islam* established that LGB people could form a PSG, the British system maintained its resistance to granting protection to sexual identity-based asylum claims.<sup>240</sup> The willingness of the British asylum system to recognise the persecution of LGB individuals and their ability to submit legitimate claims for protection under the PSG was an incremental process.

Eventually, the EU challenged the internal, immutability-based approach of the British asylum system. Although the ‘Qualification Directive’ settled that ‘sexual orientation’ could form the subject of an asylum claim, it advanced a PSG definition

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<sup>235</sup> No case reference available, see *ibid* 37.

<sup>236</sup> *Shah and Islam* (n 28) [645] (Lord Steyn), [652] (Lord Hoffmann) and [663] (Lord Millet).

<sup>237</sup> *Re GJ*, Refugee Appeal No. 1312/93 [1995] [420] (New Zealand).

<sup>238</sup> *Shah and Islam* (n 28) [643] (Lord Steyn).

<sup>239</sup> *ibid*.

<sup>240</sup> *R v. Secretary of State for Home Department, Ex Parte Jain* [1999] EWCA Civ 3009 (Schiemann LJ).

that combines the (internal) protected characteristics and (external) social perception approaches.<sup>241</sup> The definition in Article 10(1)(d) states:

[A] group shall be considered to form a particular social group where in particular:

— members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

A literal reading of the test would indicate it is a cumulative test. Divergent practices existed amongst Member States, however. For example, the Irish Statutory Instrument No. 518 of 2006 held that applicants needed only to satisfy a single test, undermining the validity and relevance of a cumulative approach.<sup>242</sup> The cumulative nature of the test was eventually confirmed by the CJEU, in the case of *X, Y and Z*.<sup>243</sup> Even before the decision in *X, Y and Z*, however, the British asylum system had adopted a conservative approach. Regulation 6(1)(d) of the Refugee Protection (Qualification) Regulations 2006, implementing the Qualification Directive into the British asylum system, explicitly requires a cumulative approach.<sup>244</sup>

Having outlined the development of the PSG area in the sexual identity context, both in refugee law and in the British asylum system, it is necessary to evaluate the decision-making of the British system.

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<sup>241</sup> Qualification Directive (n 37) art 10(1)(d), which states that, ‘depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation’. See also, ‘Refugee or Persons in Need of International Protection (Qualification) Regulations 2006’, No. 2525, reg 6(1)(d).

<sup>242</sup> ‘European Communities (Eligibility for Protection) Regulations 2006’ SI 2006/518, s.10(1)(d).

<sup>243</sup> *X, Y and Z* (n 41) [45].

<sup>244</sup> ‘Refugee or Persons in Need of International Protection (Qualification) Regulations 2006’ (n 241) reg 6(1)(d).

### 5.3 ‘Particular Social Group’ Decision-Making in *HJ (Iran)* and the Post-Decision Climate

The British asylum system recognises that LGB individuals are entitled to refugee protection because sexual identity can form a PSG ground. The actual decision-making requires closer investigation, however. It is essential to investigate whether the application of the PSG requirement is conducted fairly with regard to LGB identities. This thesis has explained from the outset that the UKSC decision of *HJ (Iran)* has been treated as a new benchmark of decision-making in sexual identity-based asylum claims, addressing historic wrongs that had resulted in the prejudicial experience of the British asylum system for LGB asylum-seekers. As a result, the UKSC’s exploration of the PSG issue provides the starting point for this particular investigation, particularly in the light of the framework provided by Article 10(1)(d) of the Qualification Directive. This sub-section will split the cumulative definition, examining first, the British asylum system’s approach to the ‘protected characteristics’ test, and second, the external ‘social perception’ test.

#### 5.3.1. *Examining the ‘Protected Characteristics’ Approach: the Problems with Narrow Conceptions of Sexual Identity*

The ‘protected characteristics’ approach to PSG is contained in the first part of Article 10(1)(d) of the Qualification Directive. Its formulation contains two alternative conceptions of a protected characteristic. The first is where the innate characteristic or common background cannot be changed, and the second is where the characteristic is so fundamental to one’s identity that group members cannot be expected to renounce it. Of these two conceptions, this section will evidence that the British asylum system has pursued the ‘immutable’ or unchangeable characterisation of sexual identity, over identifying it as fundamental to one’s identity.

The UKSC’s decision in *HJ (Iran)* demonstrates this pursuit of an immutability-based approach to the ‘protected characteristics’ test. When Lord Hope asserted his lack of doubt over whether sexual minorities could constitute a PSG, it was because the group was allegedly ‘defined by the immutable characteristic of its members’ sexual

orientation or sexuality’.<sup>245</sup> By characterising sexual identity as unchangeable for the purposes of fulfilling the PSG requirements, the UKSC may have felt that it was recognising its integral, fundamental nature. The consequence of characterising sexual identity as immutable, however, is that those LGB asylum-seekers whose identities are fluid and not fixed can be excluded or marginalised within the British asylum process.<sup>246</sup> Thus, although Lord Rodger correctly posited that ‘sexual orientation is *either* an innate or unchangeable characteristic **or** a characteristic so fundamental to identity or human dignity that it ought not be required to be changed’ (emphasis added), the fact that Lord Hope provides the lead opinion in *HJ (Iran)* is most damaging to the cause of sexual diversity.<sup>247</sup>

*HJ (Iran)*’s contradictory statements on the conception of the ‘protected characteristics’ test highlight that the case represents a missed opportunity for the UKSC to clarify the correct approach. Instead, the divergent approaches encourage decision-makers to use their discretion when dealing with PSG, as documented by Arnold.<sup>248</sup> It also gives traction to the understanding that sexuality is ‘fixed’. The notion that sexual identity is static engenders stereotyping in the RSDs of LGB claims.<sup>249</sup> It encourages restrictive assessments of what constitutes a valid identity, in line with regressive and outdated tropes on sexual identity. Thus, claimants are only considered genuine sexual minorities, capable of meeting the PSG requirement, where their identities are ‘articulated within certain parameters in order to be plausible’.<sup>250</sup>

The traction gained by the UKSC’s pursuit of a conception of an immutable sexual identity is highlighted within other parts of the British asylum system. At several instances, the Home Office guidance prioritises the immutability of the ‘protected characteristics’ approach, as highlighted by the following:

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<sup>245</sup> *HJ (Iran)* (n 102) [10-11].

<sup>246</sup> Sarah Hinger, ‘Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims’ (2010) 19 Colum. J. Gender & L. 367, 388-391; Berg and Millbank (n 92) 208-209.

<sup>247</sup> *HJ (Iran)* (n 102) [76] (Lord Rodger).

<sup>248</sup> Samantha K. Arnold, ‘Nexus with a Convention Ground: the Particular Social Group and Sexual Minority Refugees in Ireland and the United Kingdom’ (2012) Irish Law Journal 93, 106.

<sup>249</sup> Hinger (n 246) 376 and 390.

<sup>250</sup> Berg and Millbank (n 92) 210.

In addition to a common immutable characteristic...<sup>251</sup>

Even if an immutable characteristic shared by a group is not externally obvious (for example, being gay) ...<sup>252</sup>

These passages support the argument that, in the LGB context, the instructions treat the ‘protected characteristics’ approach as synonymous with immutability, ignoring the prospect that alternative conceptions provide the necessary inclusivity. Even with some distance from the *HJ (Iran)* decision, the instructions (which were updated in 2015) highlight that the British system has retained the restrictive understanding advanced by the case.

The case also reinforced the stereotyping of minority sexual identities through a second problem. This concerns the overall approach advanced on how to determine the claims of LGB people. In the five-stage test advanced by Lord Rodgers in *HJ (Iran)*, the RSD of LGB claims starts at the point where the veracity of the asylum-seeker’s claimed sexual identity must be scrutinised.<sup>253</sup> Lord Rodgers states that ‘the tribunal must first ask itself whether it is satisfied on the evidence that he is gay, or that he would be treated as gay by potential persecutors in his country of nationality’.<sup>254</sup> The scrutiny on the individual’s identity, in the light of characterising sexuality as static, proves to be extremely dangerous. At this point, decision-makers are instructed to determine the ‘genuineness’ of the claimed identity, inviting the use of stereotypes emanating from the immutable conception of sexual identity. Thus, the ominous combination of immutability and disbelief is a significant problem in the determination of LGB claims under the British asylum system. After recognising the development of this problem in the Australian context, Millbank labelled this issue a move from ‘from discretion to disbelief’.<sup>255</sup> This describes the move from refusing LGB claims on grounds of discretion to the rejection of LGB claimants’ identities. It

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<sup>251</sup> Home Office, ‘Asylum Policy Instruction: Assessing Credibility and Refugee Status’ (6 January 2015) 31.

<sup>252</sup> *ibid.*

<sup>253</sup> *HJ (Iran)* (n 102) [82].

<sup>254</sup> *ibid.*

<sup>255</sup> Millbank, ‘From Discretion to Disbelief’ (n 109).

is for this reason that Chelvan, a barrister specialising in LGBT claims, identified within the empirical data that ‘the battlefield at the moment is in relation to proving sexual identity’.<sup>256</sup>

The damaging nature of the ‘culture of disbelief’ characterising the determination of LGB claims is demonstrated by the updated Home Office guidance. This states that where one material fact is rejected, associated material facts must be rejected alongside it:

Even if a claimant’s assertion to be LGB has been determined as a material fact, the consideration of all material facts in the round may lead to the sexual identification material fact being called into question.<sup>257</sup>

As mentioned, the UKSC’s five-stage test on sexual identity-based asylum means that as a first step, decision-makers must scrutinise whether they feel the asylum-seeker’s claimed sexual identity is genuine. LGB claimants are, therefore, doubly marginalised. First, the analysis is conducted with recourse to a stereotypical understanding of sexual identity as immutable. Secondly, should the decision-maker decide on this basis that a claimant is not LGB, under the above guidance the entire claim may be refused. This is discriminatory, because before a claim is properly evaluated, it is dismissed. Such a course of action does not seem to exist in other grounds of claim.

There is an important concern to raise here. The consequence of a restrictive PSG definition is the ‘standardisation’ of non-heterosexual sexual identities, a lens through which all other claims are then examined for consistency and veracity.<sup>258</sup> Thereupon, unorthodox asylum narratives, irrespective of their truth, are disbelieved or disregarded. This forces claimants to alter the substance of their claims in inauthentic ways to successfully navigate the system. This reconstruction of their identity, however, makes applicants vulnerable to conclusions that their narratives are

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<sup>256</sup> Interview with S. Chelvan.

<sup>257</sup> ‘API: Sexual Identity Issues’ (n 3) 24.

<sup>258</sup> Hinger (n 246) 390; Berg and Millbank (n 92) 195-223.

inconclusive, inconsistent and therefore lacking in credibility, a point to be explored properly in Chapter four. The empirical data raised additional concerns regarding the negative impact of these issues on decision-making:

I think actually probably they're moving away from the law and actually starting more to say, 'You're not gay'. I think they might be avoiding the law (Barry O'Leary).

This excerpt highlights that the immutable conception of PSG facilitates poor engagement with legal standards, allowing the 'culture of disbelief' to dictate the determination of claims. Indeed, the excerpt below from the empirical data ties the tendency to disbelieve the claimant's sexuality to the success of dismantling the discretion argument:

I think the obvious thing to say is – 'Well, you're not gay' because then you don't have to ever get into the *HJ (Iran)* territory. So I think that's probably a slight reaction to some of the positive legal developments (Catherine Robinson).

Criticisms regarding the decision-maker failure to engage with the guidance and legal standards are familiar to the analysis within this chapter. The criticisms regarding the PSG context are reinforced by Arnold's empirical research. She found that decision-makers were willing to accept evidence of claimants expressing their identities in the UK as meeting the social perception test, or ignored it altogether.<sup>259</sup> The reasons for this are unclear. Nonetheless, it suggests that decision-makers have been reluctant to engage with the entirety of the test, using their discretion to depart from it when determining many LGB claims. Although some claimants may benefit from this, it leads to inconsistency across RSDs. The reluctance to engage with legal standards that are admittedly complex may also raise questions about the quality of training or the skills of decision-makers, concerns that were raised throughout the empirical data. Once again, asylum systems must ensure that their decision-makers have the competence, in terms of appropriate legal qualifications and training, to determine

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<sup>259</sup> Arnold (n 248) 105-106.

asylum claims fairly. They must also be supplied with sufficiently detailed guidance, which instructs them on how to conduct the determination in relation to the various components of the refugee definition. The guidance is not as significant an issue when it is the UKSC decision that has caused these problems, however.

It is necessary to address why the immutable characterisation has gained traction within the British asylum system. Yoshino contends that the immutability characterisation is mutually beneficial for the vast majority of decision-makers and sexual minority asylum-seekers.<sup>260</sup> Decision-makers, particularly those ignorant of sexual diversity, apply a largely heterosexual male lens to the RSD to 'stabilise' sexual identity.<sup>261</sup> This makes LGB claims easier to consider. Furthermore, Yoshino argues that it aids 'monosexual' asylum-claimants, i.e., gay men and lesbians. The immutable characterisation essentialises and legitimises their identity and their right to asylum protection in the eyes of the decision-maker and society at large. As a corollary, the fluid experiences of bisexuals and those who do not define themselves within the Western 'LGBT' framework are altogether 'erased' or restricted from the protection mechanism.<sup>262</sup> They are feared to undermine the claims of 'monosexual' sexual minorities to protection within the broader narrative. The irony is, however, that essentialised approaches to sexual identities hinder the British asylum system. They create a slower, more expensive, and less efficient asylum system, as the inadequacies of such analysis can be exposed and overturned on appeal.<sup>263</sup> Thus, the British asylum system should implement intersectionality and sexual diversity at the heart of the RSD in sexual identity-based asylum claims. This is essential. This

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<sup>260</sup> Kenji Yoshino, 'Covering' (2002) 111 Yale Law Journal 769-939, 849-864.

<sup>261</sup> Sean Rehaag, 'Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada' (2008) 53 McGill Law Journal 59, 90.

<sup>262</sup> Kenji Yoshino, 'The Epistemic Contract of Bisexual Erasure' (2000) 52 Stanford Law Review 353-461, 362 and 405.

<sup>263</sup> By way of example, according to the Freedom of Information request made as part of the empirical research, in 2011, 19,953 asylum claims lodged in the UK. 2,216 claims that were initially refused by the Home Office were allowed at appeal. In 2012, of 21,958 claims lodged, 1,829 were allowed at appeal. See 'FOI Request 27021' (n 114) 3. Moreover, Home Office statistics reveal that in the year ending March 2015, of 14,510 refused claims, 11,067 asylum appeals were lodged. Of these appeals, 28% were successful, representing approximately 3,100 successful claims. See UK Visas and Immigration, 'Immigration statistics, January to March 2015' (21 May 2015) <<https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2015/immigration-statistics-january-to-march-2015#asylum-1>> accessed 28 July 2015. This thesis contends that if the initial decisions were fairer, the British asylum system would not bear the significant costs, financial and otherwise, involved with such a high rate of successful appeals.



includes ensuring that those vested with the responsibility of the RSD (including judges) have the ability, in terms of training and legal skills, and the impetus, relating to the broader working culture, to make nuanced considerations. Doing so will improve fairness for claimants and efficiency for the system overall.

Conceiving sexual identity as immutable is inconsistent with the way sexuality is generally characterised by theorists. Diamond and Janus, for example, argue that sexual identity is fluid and flexible, changing in response to not only our social interactions,<sup>264</sup> but also the intersections of identity, such as race, sex, culture, nationality and social status.<sup>265</sup> Furthermore, Butler states that sexual orientation is created by and through culture, as opposed to being something innate, a supposition that would not find a place within the British asylum system as currently constructed.<sup>266</sup> A participant of the researcher's empirical work explained the historical characterisation of sexual identity as a political choice, which further contradicts the legitimacy of the 'immutable' classification within the British asylum system:

I think this sort of unchanging innate characteristic, and it's always been a problem around LGBT things because some people actually see it as a political choice, less now but it used to be. Lots of lesbian feminists often said, 'This is a political choice. I'm not born. This is my active choice'. And then other members of the LGBT community said, 'This is who I am and I can't change it' (Liz Barratt).

An understanding of sexual identity as 'immutable' and reliant on the 'LGBT' framework ignores that this is a Westernised structure, which sexual minority asylum-

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<sup>264</sup> Lisa M. Diamond, 'What Does Sexual Orientation Orient? A Biobehavioral Model Distinguishing Romantic Love and Sexual Desire' (2003) 111(1) *Psychological Review*, 173; 'Was It a Phase? Young Women's Relinquishment of Lesbian/Bisexual Identities over a 5-Year Period' (2003) 84(2) *Journal of Personality and Social Psychology*, 352; Samuel S. Janus and Cynthia L. Janus, *The Janus Report on Sexual Behavior* (John Wiley & Sons, 1993).

<sup>265</sup> Danielle N. Shapiro, Desdmona Rios, and Abigail J. Stewart, 'Conceptualizing Lesbian Sexual Identity Development: Narrative Accounts of Socializing Structures and Individual Decisions and Actions' (2010) 20(4) *Feminism & Psychology* 491-510, 492.

<sup>266</sup> Cited by Hinger (n 246) 390. See Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (3rd edn, Routledge, 2006) 169-174.

seekers raised in alternate societies may not recognise.<sup>267</sup> By failing to appreciate this, decision-makers export a foreign framework into the asylum system, rather than allowing claimants to present independent constructions of their identities.<sup>268</sup> This reinforces Hinger's standardisation critique, that claimants must present narratives that are familiar and recognisable to decision-makers, or fear being denied protection.<sup>269</sup> Within the empirical data, asylum-seeker participants demonstrated their unfamiliarity with the Western framework of sexual identity through their ignorance of such terminology:

In Jamaica, a lesbian is called a sodomite. A gay man is called a battyman. So you don't know nothing about LGBT or LGB... nothing like that. And when you come here and they tell you about LGBT it takes me a while to get used to the different words, and you know, meanings and all that. Because you know, we don't use them nice words... you know battyman and that means to kill you, and sodomite [is] forbid[den] (FASY002)

Many claimants did not learn of such terminology until their arrival to the UK. This undermines the prioritisation of Western frameworks of sexual identity within the asylum setting. It also privileges those asylum-seekers who have spent more time in the UK, familiarising themselves with its conceptions of sexual identity, over those who have not had that opportunity:

Even LGBT I first time heard in this country. Not in my country. That is [the case], even when you do a lot of things, even [when] you don't know what you are doing (MASY002).

It is also important to recognise that there are many LGB asylum-seekers whose identities are not fully harmonised. As with FASY003, some simply cannot articulate their identities because the process of identification is still ongoing due to intersectional reasons, such as trauma, poverty, education or opportunity:

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<sup>267</sup> *ibid* Hinger 390-2.

<sup>268</sup> Sonia Katyal, 'Exporting Identity' (2002) 14 *Yale Journal of Law and Feminism* 97, 133-134.

<sup>269</sup> Hinger (n 246) 400.

This is a question that I have been asked many times, and the truth is, I really don't know what I am. All I know is that I am a human being, first of all. All I know is that I really don't have feelings for men... As I said to my Solicitor, if there was something inside of me, I was not even prepared to admit or acknowledge it because where I come from, in a village, these things cannot even be thought of (FASY003).

Within the empirical work conducted for this thesis, practitioners and activists appraised the Home Office's understanding of sexual diversity. On the whole, they stated that the Home Office guidance was largely positive and decision-makers' understanding of sexual identity had improved. There remained clear scope for improvement, however:

I think now, the guidance, which you'd have seen, their asylum policy instructions are actually quite good. I think they do [understand how LGB identity is developed]. Whether everybody who's sitting there applying them understands is a very different matter. I think in the Home Office we have seen a change towards them getting it, yes. I don't think they're excellent at it, but it is getting better (Barry O'Leary).

O'Leary was conscious to frame his praise for these improvements through the prism of his experiences representing LGB claimants since 2001, where the understanding of sexual identity (and diversity) was far worse.<sup>270</sup>

Despite such progress, this investigation finds that under the 'immutable' characterisation of the 'protected characteristics' approach, erasure occurs along intersectional lines. The cases of claimants who are bisexual and/or women suffer the greatest marginalisation. Rehaag has documented the experiences of bisexuals within the Canadian asylum system.<sup>271</sup> He argued that the 'immutable' characterisation of sexuality within the Canadian asylum system marginalised the claims and identities of

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<sup>270</sup> Interview with Barry O'Leary.

<sup>271</sup> Rehaag (n 261).

bisexual asylum-seekers.<sup>272</sup> Bisexual narratives were routinely treated with scepticism, with decision-makers disbelieving the veracity of their truths and labelling bisexual claimants as ‘confused’. Decision-makers failed to consider bisexual-specific COI-related evidence and generally subscribed to the myth that bisexuals do not truly exist.<sup>273</sup> These barriers faced by bisexual asylum claimants were found to result in lower success rates for bisexual asylum-seekers. In the Canadian and Australian contexts, Berg and Millbank also cited the increased difficulty of bisexuals to succeed in asylum claims.<sup>274</sup> Decision-makers contended regularly that bisexual claimants could avoid persecution by engaging in opposite-sex relationships.<sup>275</sup> Furthermore, those engaged in heterosexual relationships at the time of the decision were rejected on poor credibility grounds, exemplifying the ‘culture of disbelief’ within which LGB claims are often determined.

These experiences have been mirrored in the British context. First, the ‘immutable’ characterisation of sexual identity has arguably resulted in the disbelief and exclusion of bisexual claimants from protection. For example, the case of Orashia Edwards, a Jamaican bisexual man, was documented in the British media.<sup>276</sup> The authorities rejected his claim, despite the fact that he was in a same-sex relationship, because he had been married to a woman before. In another case, a bisexual claimant was subjected to intrusive questioning that reflected the interviewer’s restrictive and overly sexualised understanding of sexual identity.<sup>277</sup> Questions included, ‘Can you explain to me in detail what you mean by bisexual,’ ‘Can you explain to me what you mean by man to man,’ ‘How many boyfriends did you have in [country],’ and ‘Why have you got to behave as a bisexual in [country]’. The interview descended into questioning of an explicitly sexual nature, concerning whether the claimant had anally

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<sup>272</sup> *ibid* 75-80.

<sup>273</sup> *ibid* 83.

<sup>274</sup> Berg and Millbank (n 92) 213.

<sup>275</sup> *ibid*.

<sup>276</sup> Siobhan Fenton, ‘Why Is Britain Forcing Bisexual Asylum Seekers to Choose between Humiliation and Death?’ *Independent* (8 May 2015) <<http://www.independent.co.uk/voices/comment/why-is-britain-forcing-bisexual-asylum-seekers-to-choose-between-humiliation-and-death-10233052.html>> accessed 15 June 2015.

<sup>277</sup> Colin Yeo, ‘Questions to a Bisexual Asylum Seeker in Detention’ (*Free Movement*, 24 January 2014) <<https://www.freemovement.org.uk/questions-to-a-bisexual-asylum-seeker-in-detention/>> accessed 18 June 2015.

penetrative sex with his partner, whether they had used condoms, and whether he had ejaculated inside of him, for example. These experiences reflect the prejudicial treatment that bisexual applicants face within the British asylum system, despite the fact that the Home Office guidance acknowledges bisexual identity.<sup>278</sup> It also highlights the prevalence of immense sexualisation within LGB claims, despite the fact that these questions do not aid the RSD. This issue is addressed in more detail within the procedural chapter (Chapter four).

The empirical data identified the marginalisation of bisexual claimants within the British asylum system:

Bisexual claims can be extremely difficult and you still see decision-makers, including judges, finding it very, very difficult to understand how somebody can be bisexual in their forties and fifties and now saying, ‘I want to live my life either in a relationship with a man or a woman,’ where there are children or a marriage in the background, or sometimes more than one marriage (Paul Dillane).

Secondly, in addition to bisexual claims, the ‘immutable’ conception marginalises the claims of sexual minority women, whose identities and experiences are consistently assumed as mirroring those of gay men.<sup>279</sup> There are clear differences in the experiences of gay men and lesbian and bisexual women, emphasised by the principle of intersectionality (Chapter one). For example, the lives of gay men can engage the ‘public’ domain far more than women, for whom there is less space for the ‘public’ expression of their identities in many countries. Therefore, persecution against lesbian and bisexual women is often carried out within the home, at the hands of family members.<sup>280</sup> The result is that the asylum system also provides less space for sexual minority women to present their sexual identities and persecutory narratives, without the significant risk of an adverse decision. Claimants must explain away the

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<sup>278</sup> API: Sexual Orientation Issues (n 88) 3.

<sup>279</sup> Berg and Millbank (n 92) 211-212. See also, Jenni Millbank, ‘Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation’ (2003) 1(3) *Seattle Journal for Social Justice* 725-742, 740-742.

<sup>280</sup> Hinger (n 246) 390.

reasons for ‘risky’ expressions of their sexuality and former heterosexual marriages and children, despite the fluidity of their sexualities and the characterisation of forced marriage as a persecutory experience.<sup>281</sup>

The empirical data highlighted the difficulties faced by women asylum-seekers. Four of the ten women interviewed had been married previously.<sup>282</sup> Of these, FASY002, a Jamaican woman, and FASY003, a Pakistani woman, were both denied protection at both Home Office and tribunal level because of these heterosexual marriages. Their previous marriages were used to deny their claimed lesbian identity, reflecting the immutable, rigid perspective on sexual identity and the ‘culture of disbelief’. This exemplifies why LGB asylum-seekers are compelled to standardise their identities and narratives to fulfil the strict confines of understanding present within the British asylum system.

The empirical data highlighted the willingness amongst decision-makers and LGB claimants to erase the authentic identities in two prominent instances. First, FASY005, a Ugandan woman, claimed asylum on the basis of being a lesbian, although she stated that she identified as bisexual. Secondly, FASY008, another Ugandan woman, clearly stated to her Home Office interviewer that she identified as a lesbian and that she had been forcibly married on this basis. The marriage resulted in the birth of a child. Despite her marriage being forced, the Home Office determined her claim on the grounds that she was a bisexual woman:

So she was saying, do you count yourself as lesbian or bisexual? I told her because I was forced to marry a man I didn’t love, I just want to be a lesbian. And then they call me bisexual (FASY008).

In FASY008’s case, the interviewer appears unable to conceive that a forced marriage to a man and a child resulting from this relationship did not mean that the claimant was bisexual.

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<sup>281</sup> API: Sexual Orientation Issues (n 88) 11. The Instructions state that parenthood or previous heterosexual relationships ‘may need to be explored at interview’ and is supplemented by the more general and onerous obligation upon claimants to ‘explain their previous actions in order to ensure that all evidence can be considered appropriately’.

<sup>282</sup> FASY002; FASY003; FASY006; and FASY008.

These concerns are manifested in the prominent case of Aderonke Apata, a Nigerian lesbian asylum-seeker.<sup>283</sup> The Home Office relied on stereotypical, archaic understandings of sexual identity to refuse her asylum claim. They contended that her previous heterosexual relationships and children proved that she was not a genuine lesbian. In an appeal before the High Court, counsel for the Home Office stated that she was ‘not part of the social group known as lesbians’, because ‘you can’t be a heterosexual one day and a lesbian the next day, just as you can’t change your race’.<sup>284</sup> The High Court also rejected Apata’s case, concurring that she had ‘engaged in same-sex relationships in detention in order to fabricate an asylum claim based on claimed lesbian sexuality’ and that she had adjusted her ‘customs and dress’ as a way of obtaining refugee status.<sup>285</sup> This suggests that the Court can also operate in a ‘culture of disbelief’ and suffer from narrow understandings of sexual diversity. The Court did not recognise that developments in the dress of LGB asylum-seekers are often connected to their perceptions of safety and self-development. It need not be a cynical move, but the natural self-expression of the claimant, given that asylum is conceived to protect these very freedoms. Moreover, under administrative law, the Court is charged with rectifying the misuse of power, not reinforcing it. Apata’s experiences exemplify that this disbelief, which is particularly virulent in LGB claims and embedded through the system, reflects partiality within the system. The ‘culture of disbelief’ is a barrier to the free and fair consideration of LGB asylum claims at all stages of the British asylum system, because it rejects common-sense reasoning to deny deserving claimants protection.

The immutability approach is unfair under the structural principles because it fails to interpret the terms of the Refugee Convention with the necessary flexibility, especially evidentiary standards. Consequently, one should seek out alternate definitions of the ‘protected characteristics’ test. The Article 10(1)(d) definition also

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<sup>283</sup> Emily Dugan, ‘Home Office Says Nigerian Asylum-Seeker Can’t Be a Lesbian as She’s Got Children’ *Independent* (3 March 2015) <<http://www.independent.co.uk/news/uk/home-news/home-office-says-nigerian-asylumseeker-cant-be-a-lesbian-as-shes-got-children-10083385.html>> accessed 18 June 2015.

<sup>284</sup> *ibid.*

<sup>285</sup> Naith Payton, ‘Nigerian activist’s asylum appeal denied as judge doesn’t believe she’s a lesbian’ (*Pink News*, 4 April 2015) <<http://www.pinknews.co.uk/2015/04/04/nigerian-activists-asylum-appeal-denied-as-judge-doesnt-believe-shes-a-lesbian/>> accessed 28 July 2015.

conceives a protected characteristic as one which is ‘innate’, or one which is ‘so fundamental to one’s identity’ a claimant cannot be expected to renounce it. In practice, one of these alternatives could be used for all sexual identity-based claims, as arguably, sexual identity can be described equally as innate or as a voluntary, but fundamental characteristic. As the PSG ground was founded on the basis of flexibility and expansiveness, it is necessary that a more generous approach to the definition be taken in claims pertaining to sexual identity. This is in line with the structural principles regarding the Refugee Convention’s status as a ‘living’ document and the need to apply evidentiary thresholds flexibly. Although alternate characterisations of the ‘protected characteristics’ test would encourage decision-makers to understand the diversity of sexual identity, this is also contingent on the agency of decision-makers, and their ability to do so through adequate skills and training. It also relies on their willingness and ability to evaluate claims free of personal and institutional bias. Having identified the presence of systemic disbelief within decision-making, it is clear that an asylum system cannot operate fairly if such a partial approach is taken to determine LGB claims, exemplified by Lord Rodger’s five-stage test in *HJ (Iran)* and the cynicism of decision-makers.

Incidentally, the *HJ (Iran)* case has already been criticised by existing work in this area, but from a sexually prescriptive perspective. Hathaway and Pobjoy argued that the UKSC went too far in mandating protectability for an infringement of activities that were only minimally connected to one’s sexual orientation. They feared that this ‘catch-all’ approach would mean that ‘risk following from any “gay” form of behaviour gives rise to refugee status’.<sup>286</sup> Hathaway and Pobjoy therefore proposed that only activities ‘intrinsically’ connected to one’s sexuality, i.e., encompassing expressions ‘reasonably required to reveal or express an individual’s sexual identity’, should be able to form the basis of an asylum claim.<sup>287</sup> This is problematic precisely because it goes against the fundamental notion of sexual diversity and feeds into the ‘immutable’ conceptualisation of sexual identity. Indeed, Millbank’s response is appropriate, explaining how even seemingly innocuous expressions of minority

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<sup>286</sup> James C. Hathaway and Jason Pobjoy, ‘Queer Cases Make Bad Law’ (2012) 44(2) New York University Journal of International Law and Politics 315, 374.

<sup>287</sup> *ibid* 382.



sexuality serve to expose the LGB identity.<sup>288</sup> As a result, the work of Hathaway and Pobjoy is of limited use to a flexible and nuanced application of the refugee definition in the LGB context.

Having examined the ‘protected characteristics’ test, this chapter now turns to the second part of the PSG definition, the ‘social perception’ test.

### 5.3.2. *The Exclusionary Potential of the ‘Social Perception’ Test*

The investigation returns to the second part of the PSG definition contained in Article 10(1)(d) of the Qualification Directive. The ‘social perception’ test is fulfilled where a group ‘has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society’.<sup>289</sup> Social perception is easily fulfilled in the states where laws are instituted against LGB people as tools of persecution, outlined by the CJEU in the case of *X, Y and Z*.<sup>290</sup> It also has an important role to play in cases where the claimant does not identify as a sexual minority, but fears persecution due to perceived membership of a social group.

There are a number of conceptual problems with the implementation of the social perception test, however. Marouf explains that the subjectivity of social perception affords considerable discretion to decision-makers.<sup>291</sup> She argues that social perceptions are an inaccurate or unreliable component of the PSG criteria, as they depend upon the identity and emotional state of the perceiver, and the past interactions of group members.<sup>292</sup> Furthermore, the visibility of a social group is not static, but dynamic and constantly changing, reliant on the personal expressions and interactions of group members in a public or social setting.<sup>293</sup> Given that perception is reliant on the perceiver’s personality, assumptions, beliefs and expectations, in relation to the individual, their society, and more broadly, their worldview, social

<sup>288</sup> Millbank, ‘The Right of Lesbians and Gay Men’ (n 126) 510.

<sup>289</sup> Qualification Directive (n 37) art 10(1)(d).

<sup>290</sup> *X, Y and Z* (n 41) [48-49].

<sup>291</sup> Fatma E. Marouf, ‘The Emerging Importance of “Social Visibility” in Defining a “Particular Social Group” and Its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender’ (2008) *Yale Law & Policy Review* 47-106, 71-75.

<sup>292</sup> *ibid* 71-72.

<sup>293</sup> *ibid* 73.

perceptions can be unreliable. The scope for such inaccuracy has grave consequences within the asylum system, which seeks to be as objective as possible and values consistency in decision-making.<sup>294</sup> Therefore, necessitating all LGB asylum-seekers to meet the social perception test is antithetical to maintaining a consistent and reliable approach to the PSG requirement within the RSD.<sup>295</sup>

Social perception tests cannot account for the impact of intersectionality on one's sexual identity and perception within society.<sup>296</sup> The makeup of one's identity can dictate whether one's social perception may be enhanced or reduced.<sup>297</sup> Furthermore, the social perception test relies on the lives of LGBT people being lived in the public sphere, which fails on two accounts. First, the lives and persecution of sexual minority women rarely take place within the public arena in the ways that they can for sexual minority men.<sup>298</sup> Secondly, social perception contradicts the fact that many LGB people will seek to behave as discreetly as possible due to the fear of being subjected to harm (which *HJ (Iran)* highlighted is also persecution).<sup>299</sup> The social perception test becomes 'discretion in reverse' for failing to recognise an individual's PSG membership when that individual has been forced to act discreetly for his or her own safety.<sup>300</sup> This is not just a theoretical argument, as the French jurisdiction operated the test to conclude that if a person hides their sexual orientation, it will not be perceived.<sup>301</sup> Contrarily, Posner J noted in the US case *Gatimi* that:

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<sup>294</sup> See section 4 of this chapter in relation to the operation of the 'well-founded' requirement to make the subjective fear of the applicant objectively verifiable. See also, James C. Hathaway and Michelle Foster (n 14) 91-181.

<sup>295</sup> Matthew D. Lieberman and Jennifer H. Pfeifer, 'The Self and Social Perception: Three Kinds of Questions in Social Cognitive Neuroscience' in Alexander Easton and Nathan J. Emery (eds) *The Cognitive Neuroscience of Social Behaviour* (Psychology Press, 2005) 195.

<sup>296</sup> Marouf (n 291) 74.

<sup>297</sup> *ibid* 74.

<sup>298</sup> Victoria Neilson, 'Homosexual or Female-Appling Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims' (2005) 16 *Stan. L. & Pol'y Rev.* 417, 437.

<sup>299</sup> Michelle Foster For UNHCR, "'The Ground with the Least Clarity": A Comparative Study of Jurisprudential Developments Relating to 'Membership of a Particular Social Group' (August 2012) PPLA/2012/02, 52-43.

<sup>300</sup> Spijkerboer and Jansen (n 51) 36.

<sup>301</sup> *ibid*.

If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be ‘seen’ by other people in the society as a ‘segment of the population’.<sup>302</sup>

The viability of the ‘social perception’ test is also dependent upon the availability of sufficient and appropriate documentation, the challenges of which were discussed under section 4. Most COI reports will provide scarce and undetailed information on social perception as they are not drafted to fulfill such complex needs.<sup>303</sup> The consequence is that decision-makers must contend with this absence in different ways. They can opt to make arbitrary decisions based on the poorly conceived information that is available. Alternatively, they can place greater emphasis on other elements in the asylum determination, such as the evidence of past persecution. This reinforces the criticism of inconsistency and, therefore, unfairness.

The discretion that is consequently afforded to decision-makers in interpreting and applying the test also contributes to inconsistency within PSG decision-making.<sup>304</sup> Claimants from the same countries of origin and with broadly similar persecutory narratives could receive different decisions based on the analytical choices of that particular decision-maker.<sup>305</sup> Furthermore, as social perception focuses on the outward appearance of LGB individuals (such as their characteristics and behaviour), the danger of stringently operating the test is that decision-makers begin relying upon commonly held physical stereotypes of sexual minorities.<sup>306</sup> This could involve granting ‘effeminate’ men or ‘masculine’ women protection over those whose

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<sup>302</sup> *Gatimi* (7th Cir, 2009) 578 F 3d 611 [615] (Posner J) (USA).

<sup>303</sup> Marouf (n 291) 75.

<sup>304</sup> *Matter of A-M-E & J-G-U* 24 I&N Dec. 69 (BIA 2007) [75] (USA); UNHCR, ‘Guidelines on International Protection No. 2: “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees’ (Social Group Guidelines) (7 May 2002) HCR/GIP/02/02, para 14.

<sup>305</sup> For example, in the three separate claims of Iranian gay men, the Swedish Migration Courts came to three completely different conclusion of the fear of persecution within Iran, having relied on the same Country of Origin information. See Petter Hojem, ‘Fleeing for Love: Asylum Seekers and Sexual Orientation in Scandinavia,’ Issue 181 of New Issues in Refugee Research (UNHCR, 2009) 16.

<sup>306</sup> Marouf (n 291) 79.

identities are not perceived according to such stereotypes. The tendency of decision-makers to rely on stereotypes has been documented above, underlining that any approach affording decision-makers the opportunity to ignore the diversity of sexual minorities is a dangerous one.

Requiring societies to distinctly classify LGB people by their sexualities for the purposes of the RSD is also illogical and unfair. Arguably, societies intolerant of LGB identities also have insufficient representations of non-heterosexual identities in their public spaces. The lack of public consciousness within which minority sexual identities often operate makes it implausible that some societies would distinctly categorise them. Thus, like the protected characteristics approach, the social perception test also relies on Western, ‘LGBT’ formulations of sexual identity and the assumption that they are replicated in asylum-producing societies.<sup>307</sup> This was raised within the empirical data:

The perception of what homosexuality is, for instance, can differ from one country to another (take for instance the fact that even in Europe, the term ‘homosexuality’ can have in certain cases a negative connotation, but not in others where it is perfectly ok to use it in a pro-equality frame). Talking to people who do not use the words we use in a European context, including because they may not even know them, doesn't happen without sensitivity. You have to understand and accept that their experience may not be described by the words that we would use, or that equality-promoters would use in the European context (Joël Le Déroff).

Turning to appraise the social perception test under the British asylum system, there are clear examples where it has facilitated nuanced and intersectional decision-making. For example, in *SW (Jamaica) CG*, although PSG membership was not at issue, the tribunal’s analysis is informed by the social perception approach.<sup>308</sup> The tribunal noted that Jamaican society was extremely homophobic and that ‘it is clear

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<sup>307</sup> Hinger (n 246) 392.

<sup>308</sup> *SW (Jamaica)* (n 147).

that the anti-gay stance in Jamaica goes right to the top of the political structure'.<sup>309</sup> As a result, single women were forced to 'present a "heterosexual narrative", normally involving male friendships and/or children',<sup>310</sup> in order to avoid the risk of harm.<sup>311</sup> Given that sexual minorities have distinct identities in Jamaican society, certain characteristics leave them susceptible to abuse, e.g., a woman living alone without a male figure is vulnerable to mistreatment as a suspected lesbian.<sup>312</sup> Thus, it would not be difficult for Jamaican LGB asylum-seekers to meet the social perception test, even without examining the existence of criminal sanctions.

With regard to the guidance provided by the Home Office, the improved instructions of 2015 are good. They state that 'LGB people in most countries will thus form members of a PSG'.<sup>313</sup> Social perception will be met where there are laws criminalising same-sex sexual acts or identifiable LGBT movements.<sup>314</sup> Yet, the Home Office fails to guide decision-makers on how the social perception issue should be determined where these two factors do not exist. Moreover, it neglects to address the aforementioned criticisms relating to the subjectivity of this particular approach by limiting the discretion of decision-makers through more instructive guidance. Thereupon, the guidance reinforces some of the issues outlined above.

The Home Office training attempts to address these concerns, but it appears that the discretion of decision-makers is unfettered:

Perceptions in the UK are not the same as perceptions in other countries though. Our cultural views are not sufficient to understand cultural views in many other countries. We must ask someone what it is about them that makes them perceived as gay or lesbian.<sup>315</sup>

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<sup>309</sup> *ibid* [101].

<sup>310</sup> *ibid* [104].

<sup>311</sup> *ibid*.

<sup>312</sup> *ibid* [107].

<sup>313</sup> 'API: Sexual Identity Issues' (n 3) 8.

<sup>314</sup> *ibid*.

<sup>315</sup> 'FOI 27021' (n 114) Appendix B, PPT21.

The training accepts that perception differ across cultural boundaries, but offers no advice on how this can be overcome. Moreover, ‘what it is about’ a particular LGB claimant that leads to them being perceived as a sexual minority is, to some extent, a departure from the requirement that a social group be distinctly recognised in a particular society. After all, the Home Office guidance states that the group must ‘have a distinct identity within the relevant country because it is perceived as being different by the surrounding society’.<sup>316</sup> This is not analogous to the question of why an individual is perceived to be a sexual minority.

The social perception approach has a role to play in the PSG segment of the RSD. It especially benefits claimants from states that criminalise sexual minority identity, or societies, which view them distinctly, as with Jamaica. But equally, applicants could be excluded from refugee protection within the British asylum system where it is difficult to identify societal consensus on LGB people. This can occur where the lack of information makes this process difficult. Exclusion can also occur where the RSD is informed by the varying cultural and sexual mores of a given society, and the perceptions that a decision-maker has of these mores, and of minority sexual identity. Thereupon, it appears that requiring all LGB asylum-seekers to meet the social perception test is unfair under the structural principles, as it represents an inflexible and narrow interpretation of the Refugee Convention. It is also unfair because the evidentiary thresholds resist the pragmatism required to ensure that genuine and deserving refugees are not excluded due to a lack of recognition of sexual diversity.

This examination of PSG issues with respect to LGB asylum claims highlights a number of problems with the statutory framework and the decision-making of the British asylum system. The *HJ (Iran)* decision has directly promoted an exclusionary approach to the protected characteristics test, whereby an immutable characterisation of PSG marginalises diverse identities not fitting the white, Western, gay conceptions of sexual identity. Though mutually beneficial to decision-makers and those asylum-seekers whose lives are or can be aligned to this framework, it denies protection to others, in particular, female sexual minority and bisexual applicants. The British asylum system would be much fairer if it chose a more inclusive definition in keeping

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<sup>316</sup> ‘API: Assessing Credibility’ (n 251) 31.

with the pragmatic spirit of the Refugee Convention and evidentiary thresholds. Similarly, whilst the social perception test benefits those whose societies show public intolerance for minority sexual identity, it is conceptually and practically unreliable, excluding those whose circumstances or identities do not fit the decision-maker or home society's conceptions of sexual identity.

Finally, the cumulative application of these two imperfect tests is also problematic. It is unfair because both tests already have exclusionary potential in their individual capacity, but the cumulative application doubles this exclusionary impact. Furthermore, there is no evidence to suggest that all genuine social groups can be defined by both criteria. The structural principles recommend a flexible and evolutionary approach to the definitions of the refugee definition, and to the application of evidentiary thresholds. Thereupon, an alternative application of Article 10(1)(d) of the Qualification Directive would be a fairer option. The tests are better suited as complementary provisions, to ensure that genuine asylum-seekers are not deprived over relatively unimportant concerns. The focus of the RSD is not how the group is defined, but whether the claimant is at risk of harm for membership of a social group. The British asylum system must not lose sight of this.

## 6. Conclusion

As stated in Chapter two, in administrative law substantive fairness involves ensuring that the outcome of a particular procedure does not wrongly injure a person's interest. In the refugee context, as LGB asylum-seekers are solely interested in obtaining refugee protection, substantive fairness hinges on whether the outcome has been fairly constituted. After all, if it is not, the consequences for LGB asylum-seekers are perilous, involving their life, liberty and security. As the criteria for asylum-seekers to obtain refugee status are contained in the refugee definition, it is the components of the definition that were scrutinised in their chapter, holding the decision-making power of the Home Office and tribunal accountable, in line with the very function of administrative law.

Under the structural principles, the researcher explained how the realisation of substantive fairness in the refugee concept centred on the relationship between fundamental rights and fairness. This had three components: first, respect for the UK's fundamental rights obligations towards LGB asylum-seekers; second, treating the Refugee Convention as a 'living' document and interpreting its provisions pragmatically; and third, applying flexibly the evidentiary standards in the Convention. The investigation has examined the British asylum system's compliance with such principles, each of which will be evaluated in turn. First, the British asylum system has shown genuine respect for the fundamental rights of LGB asylum-seekers by recognising that criminal sanctions are potentially persecutory, by removing the 'discretion' argument relied upon by decision-makers to deny claims, and by reducing the number of claims denied on the basis that claimants can internally relocate within states that clearly persecute sexual minorities. *HJ (Iran)* has played a substantial role in these developments. Yet, problems remain with the satisfaction of this principle because the system does not recognise that the 'mere existence' of criminal sanctions meets the threshold of persecution, it fails to appreciate the seriousness of psychological harm and, 'discretion' has not been totally removed from the RSD. Instead, the RSD still focuses on a claimant's behaviour, rather than 'identity', evidenced by questions turning on a claimant's 'openness'. Poor decisions on internal relocation also persist.

Secondly, the improved attitudes (and decisions) on criminal sanctions and internal relocation also represent the British asylum system's willingness to treat the terms of the Refugee Convention in a flexible manner. This could be improved further, however, by understanding that psychological harm is a serious form of persecution, recognising more extensively the practical difficulties of relocation in the LGB context, and emphasising the limitations of COI. Greater flexibility on the PSG definition is also much needed.

Thirdly, although the increased number of positive decisions in the post-*HJ (Iran)* climate suggests improvements with the application of evidentiary standards, this is not clear from this investigation. Rather this investigation has found that the British asylum system's grasp of the appropriate standards is often limited and, therefore, extremely concerning. For example, the PSG definition demonstrates some



regressive application of the evidentiary standards. This exists for both the individual components, given the restrictive approach to the ‘protected characteristics’ test and the inherent limitations of the ‘social perception’ test, and for the test’s cumulative operation. All these issues deny genuine refugees international protection. Similarly, the stringent application of the ‘reasonable degree of likelihood’ test with regard to persecution and COI fails to recognise that the evidentiary burden is low, and is supplemented by the ‘benefit of the doubt’, as Chapter four explores more fully.

Therefore, appraising the substantive fairness of the British asylum system, it is clear that the compliance with the structural principles is mixed. The attempt to adhere to matters of substantive fairness is reflected in improved guidance, training and decision-making. The persistence of negative decisions based on poor and unfair decision-making highlights that problems remain, however.

This state-of-affairs is (at least partly) due to the *HJ (Iran)* test for evaluating LGB claims inviting disbelief into the structure of the determination with its first step scrutinising the ‘genuineness’ of the claimed identity (see Chapter four for further development of this argument). It also invites the same focus on behaviour over identity regarding the ‘openness’ of the claimant, despite dispensing with the discretion test. Disbelief, ‘openness’ and the ‘immutability’ conception of PSG have led to the persistent stereotyping of LGB identities along Western, white, gay male tropes. From these issues, it is clear that decision-makers still do not understand sexual diversity, or that the relevant matter in refugee protection is identity, not behaviour. They remain ignorant of intersectionality, in terms of the breadth of analysis and understanding required for fair decision-making. The role of the legal representatives is even more critical, creating greater inequality in a system where a good representative with experience in LGB issues can be a lottery.

Additionally, the Home Office’s internal guidance is good, but fails on many occasions to provide meaningful instruction on how to conduct the necessary analysis, such as on internal relocation. If this is the task for training, not guidance, then it is also troubling that even in cases of good guidance, the advice is actively ignored. For example, claimants are still refused on the basis of previous heterosexual relationships. On COI or relocation, it appears that decision-makers simply do not

have the skills or experience to make the complex decisions required of them. This suggests issues with the basic skills of Home Office decision-makers at the time of their recruitment, or issues with training. They may also suggest the pervasiveness of partiality, namely the ‘culture of disbelief’, and that disbelief has taken priority over good quality, fair decision-making. These issues are explored in greater depth in the procedural chapter, which follows.

## Chapter four

### **PROCEDURAL FAIRNESS: THE CREDIBILITY ASSESSMENT AND THE ASYLUM PROCESS**

#### 1. Introduction

Chapter three investigated the British asylum system's determination of sexual identity-based asylum claims from a substantive fairness perspective. This chapter follows the separation between fairness in substance and procedure advanced in the theoretical chapter (Chapter two) of this thesis. It focuses on issues of procedural fairness within the British asylum system, specifically those around the assessment of asylum-seekers' credibility with regard to (subjective) documentary and narrative evidence, having examined the assessment of objective COI evidence in Chapter three. It is important to address why these stages of the credibility analysis are included in the chapter on procedural fairness. To restate the logic advanced in Chapter two, as LGB asylum-seekers and legal representatives perceive and treat the setting up of credibility through the submission of documentary and narrative evidence as part of the procedure, they are examined here. For the claimant, they are an 'external' part of the process, relating to what is required of them, whereas the examination of COI is 'internal' and specific to the decision-maker. Thus, the credibility analysis within this thesis also relates to the information provided at the screening and substantive interviews, highlighting further how the analysis is attached to procedural aspects of the asylum system.

This chapter also examines the impact of detention and accelerated procedures upon LGB claimants. There are several reasons for this: first, because they were flagged up as issues in the initial doctrinal research stage; secondly, as they formed a significant part of the asylum narratives for a substantial number of the asylum-seeker participants within the empirical data; and thirdly, because the goal of this research

was to conduct a comprehensive evaluation of the British asylum system, and detention and accelerated procedures are critical components of this system.

As procedural fairness relates closely to the lived experiences of LGB asylum-seekers claiming refugee protection, this chapter is greatly influenced by reflecting on the procedural accounts of LGB asylum-seekers interviewed for this thesis. Indeed, it is because of the fact that dignity underpins the notion of fairness and of fundamental rights that this chapter focuses on the personal narratives of the claimants regarding the experience of the asylum process and the challenges associated with direct participation in this process. Dignity, thus, is a key virtue of this chapter and of the thesis as a whole, underpinning the discussion of fairness in Chapter two.

Some aspects of this analysis speak to substantive fairness, rather than procedural fairness. As explained throughout this thesis, there is an overlap between substantive and procedural fairness. This can be attributed to the complex and disparate nature of refugee law, the multidimensional ways in which the dignity of claimants is affected and, specific to this chapter, the way in which certain aspects of procedure can affect the outcome of an asylum claim. As previously stated, substantive and procedural fairness are interwoven. This chapter also develops issues that were already raised in the previous chapter. It highlights that the ‘culture of disbelief’, for example, is an issue relevant to both substantive and procedural fairness, arising where any evidentiary standards or procedural decisions are involved.

Therefore, using the analytical framework provided by the structural principles in Chapter two, this chapter explores the most important procedural issues in the British asylum system from the LGB perspective. First, the chapter examines credibility assessments, with regard to the roles of documentary evidence and narrative evidence in successful asylum claims. Following this, the chapter explores the other procedural aspects of the system, such as the impact of detention and accelerated procedures on LGB asylum-seekers. Subsequently, it examines the recruitment, training and conduct of British asylum system personnel. The role of the legal representative in presenting the experiences of LGB asylum-seekers underpins each of these aspects, therefore, it is considered throughout this chapter.

## 2. Determining LGB Asylum Claims: Documentary Evidence and Narrative Evidence

The credibility assessment describes the process whereby information relating to the claimant's fear of persecution on a Convention ground is gathered and examined. Subsequently, a decision is taken as to whether the material elements of the narrative warrant the granting of refugee status.<sup>1</sup> The European Asylum Curriculum (EAC) defines credibility as 'a tool to establish a set of material facts to which you can apply the refugee definition (the findings of facts)'.<sup>2</sup> Decision-makers must ask of the case, 'how do they know whether they should accept the facts presented by the applicant as supported by his or her statement and the other evidence available in the case?'<sup>3</sup>

Arguably, there are two interconnected stages within a credibility assessment.<sup>4</sup> The first is where documentary evidence substantiates the claimant's narrative to the low standard of proof required, i.e., the reasonable degree of likelihood.<sup>5</sup> The second stage is triggered where there are inconsistencies or issues with the narrative and/or supporting documents. Here, where the evidentiary thresholds are not met outright through objective and/or subjective documentary evidence, the decision-maker must scrutinise the narrative evidence and decide whether the 'benefit of the doubt' should be extended to the claimant.<sup>6</sup> To clarify, objective evidence refers to COI reports, whereas subjective evidence refers to the documents a claimant may submit to substantiate the claim, as well as their narrative evidence. Thus, the second stage of

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<sup>1</sup> UNHCR, 'Beyond Proof: Credibility Assessments in EU Asylum Systems' (May 2013) 27.

<sup>2</sup> European Asylum Curriculum, 'Module 7 on Evidence Assessment' section 3.1.12 (points to remember).

<sup>3</sup> UNHCR, 'Beyond Proof' (n 1) 27.

<sup>4</sup> James A. Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21(4) *International Journal of Refugee Law* 700-26, 710-711.

<sup>5</sup> *R v. Secretary of State for the Home Department, Ex Parte Sivakumaran* [1988] AC 958 [994].

<sup>6</sup> Secretary of State for the Home Department, 'Immigration Rules' (last amended July 2008) HC 293, paragraph 339L.

the credibility assessment is a substitute pathway, occurring when the documents provided are suspect or where no evidence is available.<sup>7</sup>

Although the asylum process contains shared responsibilities on the part of the claimant and the decision-maker, academics have noted that claimants are not expected to ‘prove’ their credibility. For example, Sweeney states that since ‘credibility is an element of an alleviating evidential rule, it is anathema to ask asylum seekers to “prove” credibility’.<sup>8</sup> The New Zealand Refugee Appeals Authority agreed, stating that forcing applicants to ‘prove’ their credibility would place an unwarranted limit on the protection afforded by asylum law.<sup>9</sup> This would be illogical, when credibility does not form part of the Refugee Convention criteria of eligibility for protection. The sense that claimants must ‘prove’ their credibility, however, may be a consequence of the adversarial approach to the British asylum system (Chapter two). This burden of ‘proving’ one’s credibility is particularly acute in the LGB context, as outlined below.

Before exploring the credibility assessment, one must emphasise the omnipresence of the ‘culture of disbelief’ within it. Millbank first identified this culture in the LGB context.<sup>10</sup> She noted the consequences of prohibiting Australian decision-makers from rejecting LGB claims by asserting that claimants could ‘act discreetly’ to avoid persecution.<sup>11</sup> Instead, decision-makers refused LGB claims through ‘disbelief’, rejecting the veracity of claimants’ sexual identities. This thesis argues that British decision-making has undergone a similar trend, concretised by the UKSC decision in *HJ (Iran)* that was intended to liberate the UK system from such unfair decision-making. To restate, Lord Rodger’s five-stage test for determining LGB claims begins with whether the decision-maker ‘is satisfied on the evidence that’ the claimant is a

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<sup>7</sup> Michael Kagan, ‘Is Truth in the Eye of the Beholder-Objective Credibility Assessment in Refugee Status Determination’ (2002) 17 Geo. Immigr. LJ 367, 374.

<sup>8</sup> Sweeney (n 4) 719.

<sup>9</sup> *Re SA*, Refugee Appeal No. 265/92 (New Zealand Refugee Status Appeals Authority 1994); Kagan (n 7) 374.

<sup>10</sup> Jenni Millbank, ‘From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom’ (2009) 13 (2-3) The International Journal of Human Rights 391-414.

<sup>11</sup> *ibid.*

genuine sexual minority, or would be treated as such ‘by potential persecutors in his country of nationality’.<sup>12</sup> The test has been integrated into the British asylum system.<sup>13</sup> Verifying the ‘genuineness’ of the claimant’s identity forms the first step of determining sexual identity-based asylum claims. As argued at the outset of the investigation, this test further embeds the ‘culture of disbelief’, an element of institutional bias, into post-*HJ (Iran)* decision-making. Although this thesis recognises the need to ascertain whether a claimant truly holds the identity claimed, the inflexible, prescriptive examination of these identities at both interview and determination stage is unique to the area of LGB claims. Indeed, legal representatives interviewed for this thesis identified the existence of a ‘culture of disbelief’ in LGB decision-making:

I think that has perhaps improved, but there’s still very lengthy questioning and really, I guess, the approach is from a position – like I said, this culture of disbelief – ‘I don’t believe you’ (Catherine Robinson).

Thus, it is the manifestation of the ‘culture of disbelief’ in the interviews and RSDs of LGB claims, in terms of excessively scrutinising claimant identities, that grounds the investigation of credibility assessments. This section examines the two stages of the credibility assessment in turn. First, it explores the British asylum system’s consideration of documentary evidence provided by claimants to support their fulfilment of the refugee definition. The evidentiary standard here is the ‘reasonable degree of likelihood’ test. As Chapter three examined the role of independent Country of Origin Information, this section will focus on the provision of mostly subjective evidence by the claimant. Secondly, this section will explore the UK system’s treatment of narrative evidence, with respect to the lower evidentiary threshold, the ‘benefit of the doubt’ test.

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<sup>12</sup> *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31.

<sup>13</sup> Home Office, ‘Asylum Policy Instruction: Sexual Orientation Issues in the Asylum Claim’ (5 October 2010) 12-13.

## 2.1 Providing Subjective Documentary Evidence to Prove a ‘Credible’ Sexual Identity

In the asylum process, although there are shared responsibilities between the decision-maker and claimant, the primary duty to substantiate the claim lies with the applicant.<sup>14</sup> This burden is also articulated in the UNHCR Handbook.<sup>15</sup> The placement of certain responsibilities upon the applicant is understandable. Only a claimant can explain why he or she holds a well-founded fear of persecution and is deserving of protection. For example, a claimant’s submission of subjective documentary evidence can add weight to the content of his or her claim, once assessed. By contrast, where objective evidence is concerned, the decision-maker may be in a better position to authenticate the claim.<sup>16</sup> Consequently, the UNHCR emphasises the shared duties of the asylum process. It directs decision-makers to avoid applying the burden of proof too stringently and to recognise that ‘the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner’.<sup>17</sup> This section focuses on the assessment of subjective documentary evidence, namely, how LGB claimants provide such documents to establish a ‘credible’ sexual identity.

The Home Office 2012 instructions on assessing credibility recognise the use of documentary evidence as the primary route towards a successful claim.<sup>18</sup> They also recognise the shared responsibilities of claimant and decision-maker. The guidance underlines the shared duty of the caseworker and claimant to ‘ascertain and evaluate evidence to establish a claim’, despite the burden of proof being placed on the latter.<sup>19</sup> It also explains how decision-makers should evaluate supporting evidence.<sup>20</sup>

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<sup>14</sup> Home Office, ‘Asylum Policy Instruction: Considering Asylum Claims and Refugee Status’ (30 July 2012) 9.

<sup>15</sup> UNHCR, ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ (December 2011) HCR/1P/ENG/REV.3, para 196.

<sup>16</sup> *ibid* 196-197.

<sup>17</sup> *ibid*.

<sup>18</sup> ‘API: Considering Asylum Claims and Refugee Status’ (n 14) 9.

<sup>19</sup> *ibid*.

<sup>20</sup> *ibid* 19.



Although the guidance is of good quality, there are problems with its implementation. This thesis asserts that there is a dual problem with how this guidance is implemented within the decision-making on LGB issues. First, the evidentiary thresholds are applied inflexibly, reflecting the ‘culture of disbelief’. Claimants are often refused protection if they do not provide documentary proof of their sexual identity. Yet, the Home Office has not articulated definitively how the thresholds can be met. Secondly, the evidentiary thresholds are stringently applied because documentary evidence is viewed through a Western lens of sexual expression. Therefore, ‘valid’ identities are invariably those that have been documented and expressed in conformity with Western conceptions of sexual identity, as explored in Chapter three. These arguments are explained in further detail below.

In the post-*HJ (Iran)* climate, sexual minorities are encumbered with providing as extensive documentation as possible to prove that their self-identification as LGB (and, thereby, their claim to protection) is genuine. The empirical data corroborated the high incidence of claims being rejected on grounds that the identities were false. It also highlighted the correspondingly intensified issue for claimants and legal representatives on how to verify a claimant’s identity:

A lot of the refusals I do see through the lesbian and gay immigration group – it’s because the Home Office say somebody isn’t gay. So we want to work very, very hard at showing that this person is gay. Now, you get into the whole issue then of: how do you prove somebody’s gay or lesbian? (Barry O’Leary).

The question posed by O’Leary is a critical one: how does one prove one’s sexual identity, an internal characteristic that cannot be externally verified? In the Portuguese context, the sexual identity of the claimant appears to be accepted, and its validity is not scrutinised within the RSD.<sup>21</sup> The consequence is that there is little reliance on understanding a claimant’s sexual behaviour, reducing the role of the credibility assessment. By contrast, the credibility assessment plays a critical role in the UK system and has placed at its heart issues that the Portuguese system has

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<sup>21</sup> Nuno Ferreira, ‘Portuguese Refugee Law in the European Context: the Case of Sexuality-based Claims’ (2015) 27(3) *International Journal of Refugee Law* pp. 411-432, 427.

avoided: stereotypical and essentialised notions of sexual identity according to Western-centric (yet outdated) conceptions.<sup>22</sup> Addressed in Chapter three, this issue reappears in credibility assessments, resulting in inconsistent and often exclusionary applications of the evidentiary boundaries. These applications place greater pressure onto legal representatives, support workers and claimants to substantiate LGB claims (and sexualities) to meet unspecified boundaries, in ways that may be inauthentic to the applicant's identity.

Within the empirical data, every asylum-seeker participant attempted to meet the burden of proof through subjective evidence. They mostly provided evidence of their sexual identities that were obtained whilst living in the UK. The participants understood clearly the importance of substantiating their claims (and sexualities). Solicitors and NGOs underscored this for participants, mandating that such evidence be in place before approaching the Home Office:

But after, when I met the organisation (Imaan) and they changed my solicitor, the second solicitor was really good and professional. She explained to me more and more and more, and she said that the Home Office need to know that I am involved with LGBT life in London. So I had to prove that I am [a lesbian], I have LGBT friends and I am in some LGBT events, and like this stuff (FASY004).

Participants also articulated the pressure that they felt to substantiate the genuine nature of their sexual identities, aware of the disbelief operating within sexual identity-based asylum claims. These comments also impliedly document the recognition amongst many claimants that it is not enough to share their narratives. If they do not ensure that decision-makers recognise their expressions as genuine and validly connected to a genuine sexual identity, they risk being denied protection:

You feel under so much pressure to do these things that it's beyond, beyond just to prove [proving] your sexuality. You know you are fighting your whole

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<sup>22</sup> Kristen Walker, 'The Importance of Being Out - Sexuality and Refugee Status' (1996) 18 Sydney Law Review 568, 589-590; Sarah Hinger, 'Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims' (2010) 19 Colum. J. Gender & L. 367, 400.

life to have liberty, you know, as a lesbian. Now you have to prove. So that's why I told you today I felt emotionally drained. Because that pressure I feel is, I still even feel I have it because I have been so used to it for a long time. It's immense. It's really immense. So I felt there is so much pressure to prove (FASY007).

FASY009's experiences are especially important, exemplifying the broader impact of the culture of disbelief on the applicants themselves. FASY009, a Nigerian lesbian, believed that the only way she could substantiate the genuine nature of her sexuality and asylum claim was by engaging in a relationship. This provides a specific example of how genuine sexual identities must manifest themselves through sexual behaviour or romantic expression in order to be believed by the Home Office. These expressions are recognised as 'valid' by the decision-maker's Western lens and reliance on stereotypes because they reflect essentialised notions of sexuality. FASY009 described the struggles that she experienced to provide this evidence without the necessary material support:

I don't know if they understand my sexuality because they are asking me to prove it. And I told them that I can't and they asked me why I couldn't. So I told them, when I came here, I didn't have a house, when I knew that I could live freely with my sexuality, I didn't have a house, I didn't have anywhere, so how can I get a girlfriend. Actually, I met a girl in the park, because I'm always in the park, she wanted to come to my house, I don't have a house, she got to know that I live in the park, so she ran. So it is not easy for me (FASY009).

FASY009's experiences are extremely important for another reason. A victim of trafficking, she escaped the house where she was detained and was forced to sleep on the streets until the Red Cross advised her to claim asylum. Due to her lack of contact with LGBT organisations and her poverty, she was unable to express her sexuality freely. FASY009's desperation in the above excerpt to somehow prove her sexuality accentuates a disparity between claimants. The intersection of socio-economic deprivation, discrimination as an asylum-seeker, and racism as a Black woman living in the North East of England, provide greater understanding of the challenges in the

production of evidence. Documentary evidence plays a critical role in the claims of LGB asylum-seekers, but decision-makers do not appear to recognise that the claimants are often inhibited by their poverty and experiences of discrimination on the ‘LGBT scene’ as asylum-seekers and ethnic minorities.<sup>23</sup> The limited funds accessed by most asylum-seekers also means that claimants must already make choices between using transport, purchasing food, or other necessities, before considering the use of such funds to produce documentary evidence.<sup>24</sup>

Understanding the intersectional nature of document production is fundamental. The empirical data identified that a claimant’s circumstances often dictated their ability to provide documentation. Some participants had spent time in the UK with some status and security, expressing their sexuality and collecting a ‘portfolio’ of accompanying evidence. By contrast, applicants such as FASY009 were deprived of the opportunity to do so and were arguably placed at a disadvantaged position to meet the evidentiary burden. Indeed, this disparity raises the question as to why LGB individuals should seek asylum at the point of entry, or before their cases are fully prepared, when doing so would prejudice their chances of success.<sup>25</sup> Taking the time to prepare a claim before informing the Home Office conflicts with section 8 of the Asylum and Immigration (Treatment of Claimants) Act 2004 (given in full in Appendix C), which states that delays in claiming protection could undermine credibility (see section 2.2.2 (iii) below).<sup>26</sup> Yet, the disparity of the circumstances across the community of LGB asylum-seekers highlights the importance of documentary evidence and the prejudicial position of those who cannot show to have expressed their sexuality in certain recognised ways.<sup>27</sup> It is valuable to compare FASY009’s evidence (two letters

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<sup>23</sup> Sharalyn Jordan and Chris Morrissey, “‘On what grounds?’ LGBT asylum claims in Canada’ (April 2011) 42 *Forced Migration Review* 13-15.

<sup>24</sup> UKLGIG, “‘Missing the Mark’ - Decision Making on Lesbian, Gay (Bisexual, Trans and Intersex) Asylum Claims’ (14 October 2013) 14.

<sup>25</sup> Asylum-seekers are generally expected to make their claims for protection as soon as one enters the UK, or as soon as the need for protection arises. See, Asylum Aid, ‘The Asylum Process Made Simple’ <<http://www.asylumaid.org.uk/the-asylum-process-made-simple/>> accessed 15 November 2015.

<sup>26</sup> Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s.8; ‘API: Considering Asylum Claims and Refugee Status’ (n 14) 39.

<sup>27</sup> Walker (n 22) 589-590; Hinger (n 22) 390-400.

from the Red Cross and the Poppy Project) with evidence from MASY002, a Pakistani national who had spent time in the UK as a student before claiming asylum:

Everyone send[t] me letters, emails and ‘Icebreakers’ [the group] send[t] me letters and everything. I got about 7 letters from friend[s] and 6 letter[s] from different organisation[s], such as Icebreakers, Black Group and one is Art Group and some other groups. And he [decision-maker] saw my pictures from Gay Pride 2010. I had more than 300 pictures (MASY002).

In terms of intersectionality, there is also a gendered nature to the aforementioned experience. This relates to the greater opportunities and freedom of movement for male asylum-seekers over female, as uncovered by the research conducted by Bhabha.<sup>28</sup> Bhabha contends that the number of men accessing asylum systems across traditional asylum-recipient countries far outnumber the number of women, highlighting that there are intersectional barriers to female refugees accessing the asylum protection route.<sup>29</sup> Within the empirical data, it appeared that many of the male asylum-seeker participants had certain privileges over the female participants, which assisted them within the asylum process. Male participants were able to leave their countries of origin and seek refuge elsewhere without immediately seeking asylum and often without experiencing physical harm. Upon the expiry of their work or student visas, for example, they became *sur place* refugees. *Sur place* refugees refers to a category of individuals who require international protection after leaving their country of origin for some time, i.e., due to a change in circumstances.<sup>30</sup> This is in contrast to refugees who claim protection at the time of fleeing, as refugee protection was conceived. The mobility afforded by factors such as financial support,

<sup>28</sup> Jacqueline Bhabha, ‘Demography and Rights: Women, Children and Access to Asylum’ (2004) 16(2) International Journal of Refugee Law 227-43.

<sup>29</sup> *ibid* 233.

<sup>30</sup> ‘Immigration Rules’ (n 6) para 339P; ‘API: Considering Asylum Claims and Refugee Status (n 14) 22. Indeed, within the empirical data, four of the ten male participants interviewed for the empirical research were *sur place* refugees (MASY002, MASY005, MASY007, MASY009), compared with one female participant (FASY006). Moreover, MASY001 was able to gather his documents and leave Guyana for the UK as soon as the risk of persecution arose, whilst MASY010 was able to seek refuge in the United Arab Emirates for a number of years before fleeing once again to the UK. It is unlikely that the female participants would have had the privilege to do the same. Indeed, the greater experiences of physical abuse, psychological harm and trauma amongst the female participants of the research also highlighted the privilege of male asylum-seekers over their female counterparts, on many occasions being able to escape potentially intolerable situations sooner rather than later.

regularised immigration status and less trauma contributed to the easier process for men to document the genuine nature of their sexual identities. The construction of Western notions of sexual identity around gay men further privileges male asylum-seekers over their female counterparts.

The human cost of the burden to validate one's sexual identity is hardly recognised within the system. Professional Participant A explained how vulnerable and desperate sexual minority asylum-seekers placed themselves in exploitative situations to obtain evidence deemed critical to their claims. The participant gave the following example:

But because of this vulnerable situation he's in, the wider, white, middle class, LGBTI scene has exploited him [the claimant], where people are saying to him, 'Okay, you have sex with me and I'll write a letter to say that you're definitely gay because we've had sex with each other'. So this Home Office bit that he feels he has to do in order to prove that he's gay is putting him in a very dangerous, vulnerable situation when, in fact, we should be going to the police about this. But he's like, 'No, no, no, this is how I'm going to get my status. Don't you understand? I have to prove that I'm a gay man and this is the only way to prove it' (Professional Participant A).

This is both dangerous and degrading, at great cost to the claimant's fundamental dignity.<sup>31</sup>

This problem is heightened by the perception of claimants, representatives and decision-makers that evidence of a sexual nature is a 'quick-fix' route towards successful refugee status. It is understandable why this trend has gained momentum; sexual practice is incorrectly viewed as absolute proof of sexual identity, despite the fact that, theoretically, heterosexuals could also produce and supply such evidence. Anecdotally, the researcher knew of claimants providing sexually explicit videos and obtaining refugee status within a fortnight. The apparent receptiveness of the Home

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<sup>31</sup> The interviews with Erin Power and Professional Participant A also explained the focus of decision-makers on partners and relationships to establish the genuine nature of the claimed sexual identity.

Office encouraged the submission of such evidence. The empirical data found that former claimants with refugee status, legal representatives and decision-makers actively promoted the submission of sexually explicit evidence. They perceived it as an easier route towards overcoming the burden weighted against proving one's sexual identity and meeting the evidentiary thresholds:

So I have met some friends in the same situation and they said that they provide[d] like, they give to the Home Office some personal pictures or videos or, but I didn't do [it]. I told [them] my choice. So I didn't [provide such documents] and it was like a decision. If they don't believe all these friends who make letters for me, so they, I don't need to give them more than that. This is my border, this is my limit, that's what I can show. I cannot show other things about my private life. I came to this country to live for freedom, not to be forced to show all my private life or personal relationship (FASY004).

FASY004's argument that she would set her personal boundaries and not compromise with these for the asylum process is powerful. It addresses the idea that LGB claimants must compromise their privacy, at the expense of their fundamental rights, in order to prove their identities and obtain protection. She refused to contract with the asylum process in this way.

A culture of sexually explicit evidence only gains momentum upon the receptiveness of the Home Office to such submissions. Even the acceptance of such documentation implies its legitimacy as an evidentiary tool. Amongst Home Office personnel, some interviewers clearly rejected evidence of a sexual nature. The empirical data revealed that some decision-makers responded appropriately when presented with sexually explicit evidence, rebuffing its submission:

I told him, 'I have pictures and videos, do you want to see?' 'No, no'. 'Do you want some data?' 'No, I don't want to see' (MASY010).

By contrast, it was alarming to learn that the Home Office interviewer in the case of FASY005, a Ugandan lesbian, actually initiated the request for sexually explicit evidence:

When they asked for the video, that's when I took it personally. I said, 'that's not something that I can provide'. The interviewer asked me and I said 'that's not something I can do'. And my Solicitor said, 'that's right'. Because I knew for a long time that they asked for evidence like pictures, but now they want more than pictures, so what can you really give to them? I don't know (FASY005).

Thereupon, some Home Office personnel are not only receptive to the submission of sexual evidence, but have actively requested it, regardless of the inappropriate and flawed understanding behind it. FASY005 articulated her fears of a 'slippery slope'. If sexualised evidence became normalised, what else would sexual minority claimants have to do in order to prove their sexualities? A legal practitioner also explained how the submission of sexualised evidence (and its success in terms of obtaining refugee status for claimants) created a precedent even amongst legal representatives, legitimising its use as an evidentiary tool:

Yeah, it's outrageous. I mean I would never, ever say to a client to give any of that information because I think the Home Office should not be asking for it and I think, as lawyers, you have to do your best for your client. Absolutely, and if you're absolutely instructed that that's what they want to do, then your hands are tied. But my job is to advise clients about what the Refugee Convention says and then push the Home Office to see it broader than 'do they have a photograph of them and their girlfriend or them and their boyfriend?' But I've seen messages from lawyers saying, 'This is what I'm going to do,' and I just think, 'Don't do that' (Liz Barratt).

This is problematic for two main reasons. First, the evidential pressure placed upon LGB asylum-seekers, and the restricted perspectives of decision-makers on 'true' (and genuine) sexual expression violates the rights to dignity and privacy. Claimants must compromise with their personal boundaries, as articulated by FASY004 and



Professional Participant A, in order to provide evidence that will satisfy decision-makers' expectations of what it means to be a genuine sexual minority. That claimants perceive manipulative and debasing compromises, such as sexualised evidence or exploitative agreements, as the necessary steps for a successful claim exemplifies the degrading nature of the 'culture of disbelief'. The degrading nature of this experience is enhanced further when emphasising that LGB claimants are forced to take steps, at great personal cost, that would not be replicated in claims based on other Convention grounds. It also raises the question as to whether LGB claimants are expected to compromise on their privacy because sexual identity, in the asylum context, must be publicly experienced and expressed. After all, it is the 'openly lived' experience of sexual identity that the British asylum system purports to protect.<sup>32</sup>

Second, the irony remains that sexually explicit evidence does not prove one's sexual identity, it only proves that one has engaged in same-sex sexual behaviour.<sup>33</sup> As stated in Chapter one, sexual behaviour is only one component of sexual identity, and even then, sexual practice need not characterise one's minority sexual identity. Giving sexually explicit evidence credence provides 'bogus' migrants who are not genuinely LGB with the ability to obtain refugee status, provided that they are willing to engage in and document such behaviour. This subsequently harms those genuine LGB asylum-seekers submitting such evidence, to simply hear that even a heterosexual could submit such evidence. The approach of all parties involved, especially of certain representatives and decision-makers, is thus disappointing. It is inconsistent with the principle of sexual diversity accentuated in the introductory chapter of this thesis. It contradicts the responsibility to protect vulnerable asylum-seekers from the violation of their fundamental rights (articulated under the structural principles), such as their integrity and privacy. Moreover, it is dangerous and unethical, as it distorts the evidentiary thresholds and encourages LGB asylum-seekers to perceive sexually explicit material as valid and even necessary evidence.

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<sup>32</sup> *HJ (Iran)* (n 12) [87]. See question two of the five-stage test.

<sup>33</sup> Nicole LaMarre, 'Compulsory Heterosexuality and the Gendering of Sexual Identity: A Contemporary Analysis' (2007) 2 *The New York Sociologist* 16-26, 16. LaMarre explains how heteronormative conceptions of sexuality view desire and identity as identical, resulting in the stereotype that certain sexual behaviours correspond to specific sexual identities, i.e., same-sex sexual behaviour belonging only to sexual minority identities.

The 2015 Home Office guidance addresses this problem.<sup>34</sup> Incorporating the CJEU decision of *A, B and C*,<sup>35</sup> the Home Office directs personnel to refuse any evidence of a sexual nature, which is commendable. The Home Office must also address the overall ‘culture of disbelief’ embedded in the way LGB claims are treated. The current approach has promoted a ‘race to the bottom’ in terms of the documentary evidence likely to satisfy decision-makers, however, and places claimants in vulnerable, desperate and exploitative environments. Overall, it is unlikely that the British asylum system will change, as the 2015 instructions on sexual identity reinforces the disbelief in LGB claims:

A claimant’s self-identification as lesbian, gay or bisexual should not however be accepted as an established fact on the basis solely of the declarations of the claimant. For the purposes of the interview, any such declaration merely constitutes the starting point in the process and the point from which assessment of the facts and circumstances will be made.

Indeed, looking at the UK system outside of the submission of documents, the UKLGIG found contradictory and inconsistent approaches to the evidentiary burden within the claims of sexual minorities.<sup>36</sup> Differing outcomes on the basis of similar evidence meant that the evidentiary requirements were unclear and incoherently treated. The UKLGIG summarised the documents demanded by different Home Office caseworkers.<sup>37</sup> This highlighted, in the absence of specific guidance, the discretion handed to decision-makers on the evidentiary thresholds for a successful claim. Requested documents included proof of how individuals first became attracted to same sex partners, when they first realised their sexuality, and details of the expression of their sexualities in the UK, items that could be difficult to supply.<sup>38</sup>

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<sup>34</sup> Home Office, ‘Asylum Policy Instruction: Sexual Identity Issues in the Asylum Claim’ (February 2015) 21.

<sup>35</sup> Joined Cases C-148/13, C-149/13 and C-150/13, *A, B and C v. Staatssecretaris Van Veiligheid En Justitie* [2 December 2014].

<sup>36</sup> UKLGIG, ‘Missing the Mark’ (n 24) 13.

<sup>37</sup> *ibid* 13-14.

<sup>38</sup> *ibid*.

This has led to a call for the evidentiary requirements in sexual identity-based asylum claims to be clearly outlined.<sup>39</sup>

The inconsistent application of the burden of proof was exemplified by the case of a Cameroonian man, as his failure to discharge the evidentiary burden was cited by the tribunal judge when refusing his appeal:

There is no evidence in this case that the appellant is gay apart from what he has himself stated and the documents which he has produced from Cameroon. In particular he has had no other relations with men, and there is no evidence from the gay community in the United Kingdom about the fact that he is a homosexual.<sup>40</sup>

The empirical data supports the UKLGIG's findings of inconsistent and stringent evaluations of the evidentiary burden. A practitioner provided an insight into the segmented consideration given to evidence, against the prevailing guidance<sup>41</sup> and against the accurate application of the 'reasonable degree of likelihood' test:

What I sometimes see, and this worries me, is the compartmentalisation of the assessment of evidence by decision makers, mostly Home Office caseowners, but sometimes judges. So you've got this range of evidence... and they'll go through each piece of evidence and tell you why they reject it. The Home Office does this regularly in the refusal letters that I see, that 'I'm not putting any weight on it for this reason', whatever the case. You need to look at the evidence more holistically in the round. What is all of this telling you about this individual? And I would hope that is the way in which decision makers predominately deal with these types of cases, rather than compartmentalising the evidence, and as I say, systematically rejecting it piece by piece and

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<sup>39</sup> Senthurun Sunil Raj, 'Protecting the Persecuted: Sexual Orientation and Gender Identity Refugee Claims' (*Churchill Trust*, August 2013) 31.

<sup>40</sup> UKLGIG, 'Missing the Mark' (n 24) 13, citing tribunal decision of Cameroonian gay claimant (Hatton Cross, July 2013).

<sup>41</sup> 'API: Considering Asylum Claims and Refugee Status' (n 14) 19; *R v. Secretary of State for the Home Department, Ex Parte Karanakaran* [2000] INLR 122 [123].

breaking down the case that's before them. That surely can't be the correct way to go about these things (Paul Dillane).

Thereupon, it is not simply the burden of proof or the Western lens towards sexual identity expression that are issues within credibility assessments. Restrictive and inaccurate applications of the evidentiary burden also result in LGB claimants being denied refugee protection.

In the context of the evidentiary burden being misapplied, a practitioner warned against the over-reliance on documentary evidence as a means of obtaining successful decisions in LGB asylum claims. Documents were important, but were not a substitute for a detailed asylum statement. The importance of identifying and exploring the relevant issues in a claimant's statement, rather than focusing only on evidence, was emphasised by one of the practitioners interviewed for this thesis:

I think people are getting a bit too wound up about this, and it's really upsetting me. I think people need to realise there's no short cut. You need to explain this person's experience. I think yeah, actually, you do want some third party support, if you possibly can have it, because you want to – other people can really give testimony to somebody's sexual identity. Some people – not all people. If there's a partner – whoopee – because then I've got somebody who basically is in a same sex relationship. But just because you're not in a relationship, doesn't mean you're not gay. We don't stop being gay when we're single. So any evidence – yes, you've got to do, in your individual case, you've got to do everything you can for your client. But I would be very concerned about us going down the route of thinking that there must always be some other documentary evidence in a case, because it's quite unusual. It's quite unusual (Barry O'Leary).

Whilst O'Leary's argument is important, the emphasis placed on documentary evidence must also be viewed in the light of the challenges of narrative evidence. The Home Office's dismantling of narrative evidence, as explored below (section 2.2), places even greater onus on documentary evidence. Claimants and representatives prefer to obtain refugee protection through documentary evidence than to rely on the

inconsistent and disbelieving credibility assessments of narrative evidence. Indeed, O'Leary explained the challenges faced by legal representatives when preparing narrative evidence in an overriding system of disbelief:

It still operates in a system of disbelief, so if we prepared a statement and we've kind of got them into a position where it's really difficult to doubt this, we're okay. If you're not so prepared, there still seems to me, from talking to people at the UKLGIG, that there is a real problem over credibility, and that we're operating in a system where it's very easy just to believe that somebody's not telling you the truth (Barry O'Leary).

It appears, therefore, that (subjective) documentary evidence has been treated as playing a heightened role, even as a 'quick-fix', by all the stakeholders of the asylum system: by asylum-seekers who feel an immense pressure to fulfil stringent evidentiary requirements and resort to desperate and unethical measures; by decision-makers who understand its value and prominence, but misapply the evidentiary thresholds due to disbelief and limited understandings of sexual identity expression; and by legal representatives and support-workers, who often prioritise (subjective) documentary evidence over a detailed narrative, because it reduces their responsibility and because credibility assessments of narrative evidence are so unpredictable.

The British asylum system credibility assessment of subjective documentary evidence is unfair, as compliance with the structural principles is poor. First, there are issues with the requirement that the asylum process be impartial. The credibility assessment of documentation operates in a strong 'culture of disbelief'. There is not only a failure to accept the self-identification of LGB claimants, but a disproportionate scrutiny is placed upon their ability to evidence the truth of their sexual identities. This scrutiny is particularly problematic given that it is applied through a Western and stereotypical lens of sexual identity that contradicts the idea that claimants should present their authentic selves within the asylum process. Consequently, claimants are left to use common misconceptions about sexual identity expression in order to successfully obtain protection. Identities must be presented according to implicit frameworks in order to be recognised as valid by decision-makers or risk denial of refugee protection.

Secondly, compliance with the principle regarding access to competent representation is also questionable. This investigation has found that some legal representatives are also complicit in questionable conduct regarding evidence. Some representatives rely disproportionately on documentary evidence over narrative evidence and encourage clients to submit sexualised evidence. In essence, however, those legal representatives are merely working with the assumptions of many decision-makers that subjective evidence ‘proves’ the sexual identity, and in the eyes of the representative, therefore, is a more secure route towards refugee status.

Finally, substantive fairness is engaged by the aforementioned procedural problems and the ignorance of the intersectional oppressions that the Home Office’s conduct facilitates, on socio-economic, race and gender grounds. First, it fails to respect the fundamental rights of LGB claimants, ignoring the degrading treatment that claimants must endure, at the expense of their rights to dignity, mental and physical integrity, and privacy, to ‘prove’ their sexualities. Second, there is an inflexible, inconsistent and often segmented consideration of LGB claims and evidence, to deny that claimants meet the (low) standard of proof. This does not reflect the inherent flexibility of the evidentiary standards, which are explored in greater detail below.

These issues are amplified when narrative evidence is subjected to the credibility assessment, as the following section shall demonstrate.

## **2.2 Applying the ‘Benefit of the Doubt’ to Credibility Assessments of Narrative Evidence**

The credibility assessment becomes even more critical to the RSD in certain circumstances. In many cases, claimants, having fled their home societies and sought asylum soon after arriving, will not have sufficiently compelling documentation to obtain protection through the first (documentary) route.<sup>42</sup> Where documentary evidence is absent, insufficient or defective, the claimant’s narrative evidence, provided as a statement and at the substantive interview, is scrutinised. A practitioner

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<sup>42</sup> European Asylum Curriculum (n 2) section 3.1.12 (points to remember); UNHCR Handbook (n 15) para 196.

explained the fundamental importance of the statement and the role of the representative to produce it:

So if you bear that in mind, a lot of that time is spent working on the statement. I'm spending 20-25 hours easily, maybe more. Statements and setting up credibility are so hugely important in the asylum process (Barry O'Leary).

Indeed, narrative evidence is often used as a means of establishing credibility, and explaining away issues that may be deemed as examples of poor credibility.

As stated in section 2.1, credibility is concerned with the believability of a claim.<sup>43</sup> A believable claim is a successful claim. Where a claimant's narrative evidence is subject to the credibility assessment, believability concerns whether it is appropriate to give the claimant the 'benefit of the doubt', i.e., the standard of proof is concerned with whether the persecution is 'likely'.<sup>44</sup> This standard manifests the lower evidentiary requirements of narrative evidence when compared to documentary evidence.<sup>45</sup> According to the UNHCR Handbook, the 'benefit of the doubt' is extended where the asylum-seeker's statements are 'coherent and plausible' and do not 'run counter to generally known facts'.<sup>46</sup> The Handbook's guidance on deciding whether to extend the 'benefit of the doubt' is also integrated into the Home Office instructions on assessing credibility.<sup>47</sup> Thus, through its guidance and training, decision-makers within the British asylum system are familiar with determining whether the asylum-seeker's claim is believable and with applying the 'benefit of the doubt' standard. Once again, it is the verification of the claimant's sexual identity that forms the crux of the credibility analysis of narrative evidence. Thereupon, it also forms the focus of this investigation.

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<sup>43</sup> UNHCR, 'Beyond Proof' (n 1) 27; 'API: Considering Asylum Claims and Refugee Status' (n 14) 11.

<sup>44</sup> *ibid* 'API: Considering Asylum Claims and Refugee Status' 16; Immigration Rules (n 6) para 339L.

<sup>45</sup> Sweeney (n 4) 711.

<sup>46</sup> UNHCR Handbook (n 15) para 204.

<sup>47</sup> *ibid* para 205; 'API: Considering Asylum Claims and Refugee Status' (n 14) 16.

This particular investigation occurs in context of the UNHCR's independent examination of all credibility assessments within the British asylum system. The report found several problems with British decision-making, including the failure of decision-makers to list their credibility findings with regard to each material fact. It was unclear which facts were relevant to the potential application of the 'benefit of the doubt' principle.<sup>48</sup> Furthermore, the UNHCR found that the guidance on treating the 'benefit of the doubt' as an overall test was inconsistently applied. Some caseworkers used the principle by segmenting the facts and applying it mid-way through the assessment, rather than at the very end.<sup>49</sup> The UNHCR also criticised the UK system for insisting that claims be 'coherent', without defining the meaning of this standard. It concluded that a more 'stringent' approach was being taken in British credibility assessments than the approach advocated in the guidelines.<sup>50</sup> Thus, the 'benefit of the doubt' principle was applied too restrictively.<sup>51</sup> Moving forward, the UNHCR underscored the need for greater training in the application of the 'benefit of the doubt' principle and regular monitoring to ensure the principle's flexible application.<sup>52</sup>

In the light of these criticisms of British asylum decision-makers' application of the 'benefit of the doubt', the investigation of narrative evidence in the LGB context occurs through two lenses: memory and the prescription of 'truth'.

### *2.2.1. The Limitations Imposed by Memory upon the Presentation of 'Credible' Narrative Evidence*

A claimant's memory is the pivotal factor in the ability to present an asylum narrative that is coherent, plausible, consistent and sufficiently detailed,<sup>53</sup> as the British asylum

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<sup>48</sup> UNHCR, 'Beyond Proof' (n 1) 230-242.

<sup>49</sup> *ibid.*

<sup>50</sup> *ibid.*

<sup>51</sup> *ibid.* 249.

<sup>52</sup> *ibid.* 241-242 and 250-251.

<sup>53</sup> Jenni Millbank, "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21(1) *International Journal of Refugee Law* 1-33, 12; Audrey Macklin, 'Truth and Consequences: Credibility Determination in the Refugee Context' in *International Association of Refugee Law Judges, The Realities of Refugee Determination on the Eve of a New Millennium* (Conference Publication, 1998) 137.



system also demands.<sup>54</sup> Indeed, the UK guidance states that each material fact should be considered for its internal consistency, external consistency and for the benefit of the doubt.<sup>55</sup> Memory, however, constrains the ability to provide such a narrative.

Extensive research into memory has found that several factors inhibit the ability of asylum-seekers to recall events and, therefore, present narratives with the qualities described above. For example, although human memory fades on a continuum, i.e., in a constant way, this depends on how the applicant regards those events.<sup>56</sup> The details of an event that an individual deems peripheral are forgotten within the first six months after its occurrence.<sup>57</sup> The ability to remember fades in a selective, non-uniform way. An individual remembers only what his or her personal perceptions regard as central to the event. Tests conducted as far back as 1932 indicate that when an individual's memory lapses over time, the details that are forgotten are those deemed incongruent with the individual's expectations.<sup>58</sup> To ensure congruence within the story, humans alter and streamline their understanding and future description of an event. Thus, in the asylum setting, claimants are often betrayed by their memories, their minds altering their frames of events, shedding details that may be important to the interviewer. This exposes the potential for discrepancies to occur within narrative evidence due to the tension between the claimant's memory and the interviewer's expectations.

The method of accessing one's memory to present a consistent asylum narrative is also dictated by 'reminiscence'.<sup>59</sup> This describes the way in which the brain 'releases' new information regarding an event upon being requested repeatedly to recall it.<sup>60</sup> Theorists have argued that once the brain has been requested to recall

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<sup>54</sup> 'API: Considering Asylum Claims and Refugee Status' (n 14) 13-18.

<sup>55</sup> *ibid* 18.

<sup>56</sup> Thomas Bingham, 'The Judge as Juror: The Judicial Determination of Factual Issues' (1985) 38(1) *Current Legal Problems* 1-27.

<sup>57</sup> *ibid*.

<sup>58</sup> Frederic C. Bartlett, *Remembering* (CUP, 1932).

<sup>59</sup> Jane Herlihy, Peter Scragg, and Stuart Turner, 'Discrepancies in Autobiographical Memories - Implications for the Assessment of Asylum Seekers: Repeated Interviews Study' (2002) 324 (7333) *BMJ* 324-27, 327.

<sup>60</sup> *ibid*.

something, though the individual may not be aware of it, the search continues subconsciously, gradually uncovering further layers of information.<sup>61</sup> As asylum-seekers are requested to repeat their narratives on several occasions, reminiscence dictates that no two recollections of a particular event will match in their entirety.<sup>62</sup> Each time an individual is asked to recall an event, essentially this is a ‘reconstructed’ account.<sup>63</sup> It is natural that aspects will vary; sometimes it is a refinement and clarification, and at other times, depending on the delay between the accounts, it is an entirely new reconstruction. Consequently, studies establish why human memory is naturally predisposed towards producing inconsistencies through repeated instances of disclosure, and why inconsistency is a natural feature of the asylum narrative.

Trauma has a significantly destructive impact upon one’s memory and ability to recall events. Studies have shown that victims of trauma actively avoid being placed in situations that will trigger painful memories.<sup>64</sup> If forced to do so, it often results in ‘dissociation’. Dissociation is defined as a ‘disruption in the usually integrated functions of unconsciousness, memory, identity, or perception of the environment’.<sup>65</sup> It describes the use of strategies of detachment to manage painful memories. Dissociation can occur both in the aftermath of the mistreatment and during the actual mistreatment, doubly affecting an individual’s ability to recall a traumatic experience.<sup>66</sup> For victims of trauma, the nature and quality of the memories themselves are also affected. For example, those suffering from PTSD and depression were found to have higher levels of ‘overgenerality’ and ‘non-specificity’ in their autobiographic memories.<sup>67</sup> Furthermore, whilst clear narratives frame autobiographic memories, traumatic memories were found to be more primitive,

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<sup>61</sup> *ibid.*

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.*

<sup>64</sup> Jane Herlihy and Stuart W. Turner, ‘The Psychology of Seeking Protection’ (2009) 21(2) *International Journal of Refugee Law* 171-192, 177-178.

<sup>65</sup> American Psychiatric Association, ‘Diagnostic and Statistical Manual of Mental Disorders’ (4th edn, DSM-IV, 1994) 13.

<sup>66</sup> Daniel S. Weiss et al., ‘Predicting Symptomatic Distress in Emergency Services Personnel’ (1995) 63(3) *Journal of Consulting and Clinical Psychology* 361-368, 361.

<sup>67</sup> Jane Herlihy and Stuart W. Turner, ‘Asylum Claims and Memory of Trauma: Sharing Our Knowledge’ (2007) 191(1) *British Journal of Psychiatry*, 3-4; Belinda Graham, Jane Herlihy, and Chris R. Brewin, ‘Overgeneral Memory in Asylum Seekers and Refugees’ (2014) 45(3) *Journal of Behavior Therapy and Experimental Psychiatry* 375-80, 378.

existing not as stories or narratives that can be recalled with specificity and detail, but as sensory flashbacks triggered by certain events.<sup>68</sup> These studies weaken the belief that traumatised asylum-seekers can provide narratives with detail and coherence.

In the refugee context, research has highlighted the limitations upon the memories of victims of violence and torture. A study on the impact of sexual violence on disclosure during asylum interviews found that victims of sexual violence reported greater PTSD severity and experienced dissociative symptoms.<sup>69</sup> This affected their ability to disclose experiences of trauma when interviewed. Those experiencing symptoms of the greatest severity found recalling these events at the interview stage to be the most challenging. Another study on discrepancies in autobiographical narratives highlighted the problematic nature of making poor credibility assessments on the basis of inconsistencies, given that discrepancies are a regular feature of asylum narratives.<sup>70</sup> Where individuals suffered from PTSD or waited a significant period between interviews, the likelihood of discrepancies concerning the consistency, detail and coherence of asylum statements was increased.<sup>71</sup> Those suffering from PTSD or depression were ‘less able to retrieve specific memories of their personal past within a given time limit when prompted to do so’.<sup>72</sup> Consequently, decision-makers must grapple with the realities and limitations of the human memory, especially due to the prevalence of trauma and poor mental health amongst asylum-seekers. This is particularly important in the LGB context, given the high incidence of poor mental health, torture and trauma therein (Chapter three).

Therefore, there is scientific evidence to suggest that our memories cannot always produce consistent, coherent and detailed narratives. This, alongside the impact of trauma on recollection, exposes the tension between the perception of decision-makers regarding ‘credible asylum narratives’, on the one hand, and the reality of many genuine asylum-seekers’ abilities to produce them, on the other hand. It is

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<sup>68</sup> Herlihy and Turner, ‘The Psychology of Seeking Protection’ (n 64) 176.

<sup>69</sup> Diane Bögner, Jane Herlihy, and Chris R. Brewin, ‘Impact of Sexual Violence on Disclosure During Home Office Interviews’ (2007) 191(1) *The British Journal of Psychiatry* 75-81, 78-79.

<sup>70</sup> Herlihy, Scragg and Turner, ‘Discrepancies in Autobiographical Memories’ (n 59) 324.

<sup>71</sup> *ibid.*

<sup>72</sup> Graham, Herlihy and Brewin, ‘Impact of Sexual Violence on Disclosure’ (n 67) 379-380.

crucial to explore whether the British asylum system has addressed this tension, and if so, how.

On the whole, the British asylum system pays little attention to memory. The training provided to the Home Office caseworkers on LGB issues does not provide guidance on memory with respect of narrative evidence. The 2010 instructions on sexual orientation are silent on this matter, whereas the 2012 guidelines on credibility instruct caseworkers to be ‘aware of the profile of the claimant’.<sup>73</sup> This guidance directs decision-makers to expect a certain level of detail in the claimants’ disclosures, but provides a number of caveats, including but not being limited to, ‘age; gender; mental health issues; mental or emotional trauma; fear and/or mistrust of authorities; feelings of shame; painful memories particularly those of a sexual nature and cultural implications’.<sup>74</sup> Although they do not explicitly reference memory, one could argue that consideration of the issue is engaged amongst these caveats.

Within an interview for the empirical research, the Former Home Office decision-maker was questioned on how the British asylum system would deal with the diminished memory of an asylum-seeker:

There are, probably, sufficient safeguards built into the training of the people who carry out the process, if they follow their training. So, if someone follows best practice, it wouldn’t be a problem to interview someone who has problems with memory (Former Home Office decision-maker).

In the absence of detailed information on the content of initial training of decision-makers, this thesis cannot verify this contention that the training contains safeguards to ensure that poor memory does not prejudice the consideration of narrative evidence.

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<sup>73</sup> ‘API: Considering Asylum Claims and Refugee Status’ (n 14) 14.

<sup>74</sup> *ibid.*

Issues regarding the memory of asylum-seekers are significant in the LGB context because of the high incidence of trauma amongst sexual minority claimants (Chapter three). Shidlo and Ahola concurred, finding amongst LGB asylum-seekers ‘common diagnoses’ of ‘recurrent depression, dissociative disorders, panic disorder, generalised anxiety disorder, social anxiety, traumatic brain injury and substance abuse’.<sup>75</sup> Consistent with the relationship between trauma and poor memory, several asylum-seekers within the empirical data explained the impact of their persecutory experiences upon the ability to recall events at the substantive interview:

And my state of mind is not ready to start remembering certain things like that, to be honest. Some are really, really painful and very traumatic [memories], that you know, like opening up about the kind of torture you went through, even if it was a woman I was talking to, some things are really, really, very extreme. But really, you’re forced to say and otherwise, you’re a liar. You’re this, you’re that. So I feel it’s very uncomfortable (FASY007).

This excerpt reveals the distressing process of complying with the asylum procedure, which demands detailed, coherent and consistent narratives.<sup>76</sup> FASY007, a Ugandan lesbian and victim of torture, reveals a level of dissociation from her experiences. She was unable or unwilling to recall the persecutory treatment, given the threat of being re-traumatised. Recognising the rigid nature of the system’s expectations, she described the pressure involved. Should she fail to comply with the disclosures expected, her claim for refugee protection would be rejected. Indeed, the Home Office eventually rejected her claim.

FASY009 also articulated this struggle:

When I told her, there was something she was asking me that I cannot remember, because before I claimed asylum, I was in a terrible situation... And I was trying to explain to her that, ‘you are telling me, you are asking me something which I cannot even remember’ and I was telling you, ‘I went

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<sup>75</sup> Ariel Shidlo and Joanne Ahola, ‘Mental Health Challenges of LGBT Forced Migrants’ (2013) 42 *Forced Migration Review* 9.

<sup>76</sup> Hinger (n 22) 388-389.

through this kind of situation and you are asking me', okay, she was asking me the address of a place, of a country I don't know, a country I came to and I don't know anywhere, and you are asking me about the address. How can I remember the address after all of those things that I have gone through? I can't put that in my brain because a lot is going on in my head. And we had an argument and I got upset there (FASY009).

FASY009, a Nigerian lesbian, also describes the inflexibility of the system in terms of the questions at the substantive interview. Her interviewer failed to acknowledge that there were several reasons behind her struggle to recall the details requested. Instead, she continued to press for specific details without empathy. FASY009's memory may have been affected by the fact that she was a victim of rape and other violence. Her other circumstances, such as spending very little time in the UK, and doing so as a victim of trafficking, with little freedom of movement, also mandated a more empathetic approach. The interviewer should have recognised why FASY009 could not provide the requested information, instead of pressing for it regardless. The resultant conflict may even have affected FASY009's disclosure within the interview on other issues.

At tribunal level, the empirical data also found a poor grasp of the relationship between trauma and poor memory:

I think this is the only reason, the biggest reason why they could not accept me. After that, they said, that the date at the big interview and the date at the court are different. I said that I can't tell them anything because I am taking medication here. If you take the tablets, you forget lots of things. I said, I can't tell you that I remember everything (MASY004).

For MASY004, a gay national of Burkina Faso who was taking medication to help with his trauma, there was poor knowledge at tribunal level of the relationship between trauma and memory, especially within a high-pressured environment like the

asylum process.<sup>77</sup> The fact that he was taking medication for his poor mental health did not appear to be a relevant factor. He flagged up his poor memory and its relationship to his poor mental health, but this did not appear to result in a more empathetic approach, as he was also refused protection at tribunal level. This suggests that the poor understanding of memory is an issue throughout the asylum system.

Despite direction to consider the ‘profile of the claimant’, decision-makers rarely implement this understanding on memory at the interview and decision-making stages. Too often, the ‘culture of disbelief’ takes precedence over consideration of the practicalities of accessing traumatic memories, or of how humans frame their memories. Arguably, it is the combination of poor understanding and the dominant culture of disbelief that leads to interviewers adopting restrictive or closed questioning styles<sup>78</sup> to catch out asylum-seekers when they present their narratives, as the empirical data highlights. This disbelief also appears within the decisions themselves. Reasons for denying the credibility of narrative evidence are used to deny refugee protection. Even if decision-makers do not deprive claimants of the ‘benefit of the doubt’, such imprudent conduct pressurises claimants and inhibits their ability or willingness to disclose. This argument was raised within the empirical data:

The whole question process is designed to catch people out, you know the same questions are asked continually but in different formats, and if people give some little detail different[ly], then it’s an inconsistency, therefore, bad credibility (Professional Participant A).

This interviewing style was corroborated by nearly all of the asylum-seeker participants of the empirical research. Equally importantly, this restrictive approach continues at RSD and appeal stage. Inconsistencies are seized in order to deny the credibility of applicants’ narrative evidence, due to the culture of disbelief and the

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<sup>77</sup> Jane Herlihy, Laura Jobson and Stuart Turner, ‘Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum’ (2012) 26(5) *Applied Cognitive Psychology* 661-676, 665.

<sup>78</sup> Independent Chief Inspector of the UK Border Agency, ‘An Investigation into the Home Office’s Handling of Asylum Claims Made on the Grounds of Sexual Orientation: March – June 2014’ (October 2014) 40.

insufficient knowledge of how trauma and memory relate to one another. The consequence is that claimants can be denied protection for reasons that deserve the ‘benefit of the doubt’, as exemplified by MASY004 above and section 2.2.2.

The empirical data underscored that time does not abate the impact of trauma. An asylum-seeker participant of the empirical research had obtained time, maturity and perspective since the events forming the narrative of persecution, but still struggled with recalling the events in a non-pressurised environment. This was due to the debilitating impact of trauma upon her memory:

I have been living here for 10 years. I had matured, I was independent, but still, I was struggling with telling them this aspect of myself. What happens to people who newly come to the country and the Home Office just expects them to tell them everything? If you had asked me 10 years ago, I don’t think I would have been able to tell them anything. It was too scary, just sometimes, you know, it numbs your brain and you don’t remember that much. But after some time, you sit down, you reflect and you think more about it, what exactly happened, you start to remember and you get there. That’s how I think it should work (FASY010).

FASY010, a Pakistani lesbian, describes the stark nature of the challenge presented to asylum-seekers to access traumatic memories, regardless of the time that has passed since their occurrence. It also emphasises, in some way, the critical role played by legal representatives and support workers to invest the time necessary to produce narrative evidence of a high quality, as O’Leary discussed above.

Once again, the empirical research highlighted the gendered, and therefore, intersectional division of experiences. As Chapter three explained, a greater number of female asylum-seeker participants indicated that they were victims of trauma and sufferers of poor mental health. Similarly, on the impact of memory on asylum-seeker disclosure, aside from MASY004, only female participants highlighted the struggle to recall traumatic events. Such struggles take place in context of increasing pressure from decision-makers for consistent and detailed narrative evidence. Again, the gender divide is explainable by the fact that female asylum-seeker participants of



the empirical research were more likely to have had actual experiences of persecution than their male counterparts, reinforcing the link between trauma and poor memory.

Thereupon, the British asylum system is procedurally unfair because it does not acknowledge the role of diminished memories amongst asylum-seekers, including LGBs. With reference to the structural principles, detailed guidance and training on memory, and on the way in which trauma and mental health issues affect claimants' willingness and ability to disclose information, is absent. Thus, the British system does not integrate such knowledge into its interview or RSD process to ensure that decisions are approached and taken with sensitivity and flexibility. This aspect of asylum procedure is also substantively unfair, as the evidentiary standards are, therefore, applied incorrectly. The failure to apply the 'benefit of the doubt' test appropriately causes genuine LGB refugees to be deprived of refugee status for struggling with recollection due to their persecutory experiences.

To address this, the British asylum system must ensure compliance with two of the structural principles under the procedural fairness theme. First, the British system must ensure that there is proper guidance on the limitations of memory and the impact of trauma on asylum-seekers' ability to recall. Guidance is thus required on how credibility assessments are to be conducted, with reference to the 'benefit of the doubt'. Coordination between all instructions and training is vital, including the sexual identity instructions, reflecting the acute nature of this problem in the LGB context. Secondly, the British asylum system must ensure that its decision-makers are trained in the same matters, in all claims, including within the LGB context. Immigration judges are not exempt from this obligation. Empirical data and anecdotal experience of ignorance amongst immigration judges on this topic means that tribunal-level guidance and training is equally crucial to a fair asylum system. For practical guidance on how the UK system can improve its credibility assessments of narrative evidence, decision-makers should look to the Hungarian Helsinki Committee's training manual on credibility issues.<sup>79</sup> This provides instructive guidance on how the studies on memory should inform the asylum process.<sup>80</sup>

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<sup>79</sup> Gábor Gyulai (ed), 'Credibility Assessment in Asylum Procedures - a Multidisciplinary Training Manual' 1 (*Hungarian Helsinki Committee*, 2013).

<sup>80</sup> *ibid* 63-102.

The Home Office has since improved its guidance on memory. As these instructions did not apply to the asylum claims assessed within the empirical research, it is considered here simply for the purpose of examining future decision-making. The 2015 instructions reference memory by directing decision-makers to ‘take into account any personal factors which may explain why a claimant’s testimony might be inconsistent with other evidence, lacking in details, or there has been a late disclosure of evidence’.<sup>81</sup> The examples include, ‘variations in the capacity of human memory’, ‘painful memories’ and ‘emotional trauma’.<sup>82</sup> Furthermore, the 2015 instructions on sexual identity state that decision-makers should not ‘necessarily expect claimants to recall all minutiae of previous relationships or even, in some circumstances, the names of previous partners’.<sup>83</sup> Although this is an improvement, it still fails to integrate the pre-existing knowledge of the limitations of human memory, both generally and in the context of claimants with trauma and poor mental health. The instructions do not provide practical guidance on applying the ‘benefit of the doubt’ to narrative evidence limited by poor memory. This is despite the studies on memory focusing on the asylum context, and offering meaningful guidance on modifying the credibility assessment accordingly.<sup>84</sup> Consequently, until the British asylum system incorporates these understandings in a systematic and coordinated way, i.e., through guidance and training for Home Office and tribunal decision-makers, this thesis does not envisage any significant change in the system’s unfair treatment of memory.

### 2.2.2. *The Role of ‘Truth’ in Credibility Assessments of Narrative Evidence*

Establishing the role of ‘truth’ in the credibility assessment is critical to the fair operation of an asylum system. As stated above, the role of the credibility assessment is to determine whether the claim is believable, not necessarily true. In the case of narrative evidence, believability articulates the low evidentiary standards of the ‘benefit of the doubt’ test. The practice of treating ‘truthful’ asylum claims as

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<sup>81</sup> Home Office, ‘Asylum Policy Instruction: Assessing Credibility and Refugee Status’ (6 January 2015) 13-14.

<sup>82</sup> *ibid.*

<sup>83</sup> ‘API: Sexual Identity Issues’ (n 34) 21.

<sup>84</sup> Gyulai (n 79) 63-102.

synonymous with ‘credible’ asylum claims has little support.<sup>85</sup> For example, the UNHCR states that ‘[e]ven where the initial submission includes false statements (...) the applicant can still be able to establish a credible claim’.<sup>86</sup> So, untruths within a claimant’s narrative should not necessitate the denial of refugee protection. This reinforces that credibility is not a ‘search for the truth’, but an evaluation of the narrative’s ‘likelihood’.<sup>87</sup> This is reflected, to some extent, in the Home Office’s credibility guidelines, which reference the UNHCR Handbook’s warning that ‘it is hardly possible for a refugee to “prove” every part of his case and, indeed, if this were the requirement the majority of refugees would not have been recognised’.<sup>88</sup>

A ‘credible’ claim is thus not interchangeable with a ‘truthful’ claim.<sup>89</sup> A ‘credible’ claim is one that ‘could have happened’, i.e., that is generally plausible, consistent and externally verified, where appropriate and possible.<sup>90</sup> This is summarised by the UNHCR, which states that a claim is considered credible where a narrative ‘is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed’.<sup>91</sup> The UNHCR thus treats ‘being credible’ as an alternative to ‘being true’, not as a synonym to it.<sup>92</sup> If claimants were to prove that their statements were ‘true’ rather than ‘credible’, this would be tantamount to imposing a more stringent evidentiary burden of proof, excluding deserving claimants.

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<sup>85</sup> ‘API: Considering Asylum Claims and Refugee Status’ (n 14) 11.

<sup>86</sup> UNHCR, ‘Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A (2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees’ (23 October 2012) HCR/GIP/12/09, para 38.

<sup>87</sup> Catherine Dauvergne and Jenni Millbank, ‘Burdened by Proof: How the Australian Refugee Review Tribunal Has Failed Lesbian and Gay Asylum Seekers’ (2003) 31 *Federal Law Review* 299-342, 308.

<sup>88</sup> ‘API: Considering Asylum Claims and Refugee Status’ (n 14) 12, citing UNHCR Handbook (n 15) para 203. This is also highlighted by the Australian tribunal guidelines, which direct decision-makers to determine not whether they personally believe the narrative, but whether it is objectively believable. See, Australian Migration Review Tribunal/Refugee Review Tribunal, ‘Guidance on the Assessment of Credibility’ (March 2012) < <http://www.mrt-rrt.gov.au/Files/HTML/G1-Guidance-on-the-Assessment-of-Credibility.html> > accessed 29 November 2015.

<sup>89</sup> Millbank, ‘The Ring of Truth’ (n 53) 5; Kagan (n 7) 371.

<sup>90</sup> *ibid* Kagan; Sweeney (n 4) 700.

<sup>91</sup> UNHCR, ‘Note on Burden and Standard of Proof in Refugee Claims’ (16 November 1998) para 11.

<sup>92</sup> Sweeney (n 4) 710-711.

Having established that truth plays a limited role in the assessment of narrative evidence, this sub-section appraises the British system's application of this principle. It examines the law and policy on the matter of truth and believability before scrutinising its implementation.

The 2012 instructions on assessing credibility reflect the focus on believability over truth. They direct decision-makers to consider whether they 'believe the applicant's evidence about these past and present events and how much weight to attach to that evidence bearing in mind the low standard of proof required'.<sup>93</sup> Decision-makers are also given guidance on how to implement the 'benefit of the doubt'.<sup>94</sup> Accordingly, the instructions were praised within the empirical data:

Again, I say that the API on credibility is commendable and is very good (Paul Dillane).

The 2012 instructions explained the importance of considering all the facts 'in the round' and putting any inconsistencies to the claimant to explain.<sup>95</sup> The 2015 instructions have since taken this further:

The question to be asked is whether, taken in the round, the caseworker accepts what he or she has been told and the other evidence provided. In practice, if the claimant provides evidence that, when considered in the round, indicates that the fact is 'reasonably likely', it can be accepted. A caseworker does not need to be 'certain', 'convinced', or even 'satisfied' of the truth of the account – that sets too high a standard of proof. It is enough that it can be 'accepted'.<sup>96</sup>

Moreover, on the impact of 'lies' on credibility, the guidance states:

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<sup>93</sup> 'API: Considering Asylum Claims and Assessing Credibility' (n 14) 11.

<sup>94</sup> *ibid* 15-16.

<sup>95</sup> *ibid* 13-14.

<sup>96</sup> 'API: Assessing Credibility and Refugee Status' (n 81) 12.

A claimant's testimony may include lies or exaggerations for a variety of reasons, not all of which need reflect adversely on other areas. Depending on their relevance to the totality of the evidence, falsehoods will be troubling but do not mean that everything the claimant has said must be dismissed as unreliable.<sup>97</sup>

Thus, a claimant can tell some lies and still warrant the 'benefit of the doubt' being extended to grant refugee protection.<sup>98</sup>

In terms of implementing the guidance on believability in narrative evidence, this subsection examines the way that decision-makers have actively placed 'truth' into their credibility assessments. This is exemplified by decisions relating to the behaviour, sexual identity and other identity categories relevant to LGB asylum-seekers.

#### i. 'Unreasonable' Behaviour

When assessing the narrative evidence of LGB asylum-seekers, pronouncements are regularly made on what is considered to be reasonable behaviour. What is deemed 'unreasonable' is, therefore, lacking in credibility. Such assessments, that the experiences of asylum-seekers cannot be true because they are unreasonable, are then used to disbelieve the veracity of the claimant's sexual identity.<sup>99</sup> When claimants cannot surpass this first hurdle of the Lord Rodgers test in *HJ (Iran)*, it is unlikely that the rest of their claim will be given further consideration. The 'benefit of the doubt' is not considered because the 'false' sexual identity negates the entire claim.

The UKLGIG noted that many surveyed claims were refused on this ground. It was not credible that claimants would pursue 'risky' sexual behaviour potentially exposing their sexualities.<sup>100</sup> For example, decision-makers disbelieved the likelihood of claimants engaging in a same-sex relationship, despite knowledge of 'Sharia law'

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<sup>97</sup> *ibid.*

<sup>98</sup> UNHCR, 'Sexual Orientation Guidelines' (n 86) para 38.

<sup>99</sup> Millbank, 'The Ring of Truth' (n 53) 23-26.

<sup>100</sup> UKLGIG, 'Missing the Mark' (n 24) 11, citing UKLGIG, "'Failing the Grade" - Home Office Initial Decisions on Lesbian and Gay Asylum Claims' (8 April 2010) 9.

and its sanctions.<sup>101</sup> These decisions contain a narrow understanding of human behaviour, and ignore the fact that human lives are not always lived rationally and logically. The oppressive environments under which sexual minorities are forced to live exacerbate this, alongside the reality that sexual minorities must transgress prohibitive social codes to somehow express their sexualities.<sup>102</sup> This is complicated further by intersectional factors (see below). The concept of ‘reasonableness’ is also framed by culture: what may seem risky or irrational to the Western mind may not be so in an alternate culture.<sup>103</sup> Decision-makers should be cognisant of these factors to ensure fair credibility assessments.

Consequently, prescriptive understandings of plausible and, therefore, credible behaviour, informs the British asylum system in terms of the interviewing style (i.e., ‘catching out’ claimants through questioning). Poor credibility then also forms a common reason why LGB asylum claimants are refused refugee protection. This is demonstrated by an example offered within the empirical data:

A young Ugandan woman claimed that a member of her family walked in and found her in bed having sexual intercourse with another woman and I can’t quote the refusal decision word for word, but the argument deployed was, ‘Given the consequences, if somebody had found out that you’re having sex with another woman, we don’t think that a reasonable person would have risked having sex with a member of the same sex in your country’. That argument is astonishing (Paul Dillane).

FASY007, a Ugandan lesbian who had been refused protection at the initial and appeal stages, and was due to be returned to Uganda, also provided a similar example:

Well, they say that they went to the schools I went to in Uganda and the schools clearly stated that no homosexual activities take place. So they

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<sup>101</sup> *ibid* ‘Missing the Mark’ 21.

<sup>102</sup> James D. Wilets, ‘Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective’ (1996) 60 *Alb. L. Rev.* 989, 991 and 1011.

<sup>103</sup> Hinger (n 22) 388-392; See also, Herlihy, Jobson and Turner (n 77) 668, for the impact of culture on memory.

believe that there is no way, if a school has a policy of no homosexuals accepted, there is no way I would go ahead and try and play with girls. They say there is no way I would hide in bathrooms late at night and maybe have sex with my girlfriend (FASY007).

In these cases, the claimants were refused asylum due to the decision-maker's confidence that the actions in question could not have been true. These experiences highlight a lack of empathy. They show the unwillingness of interviewers and decision-makers to place themselves in such environments when evaluating the credibility of claimants' experiences. It is particularly challenging that decision-makers have used weightless assurances from the country of origin to deny the validity of claimants' experiences. What is also problematic, however, is that these issues have been highlighted prior to the period in which this investigation occurs. In its 2010 report, 'Failing the Grade', the UKLGIG highlighted the burden placed upon sexual minority claimants to 'avoid the behaviours that resulted in their persecution'.<sup>104</sup> In its 2013 follow-up report, the persistence of this problem forced the UKLGIG to raise the issue again.<sup>105</sup> Here, the placement of 'truth' over believability into the credibility assessment manifests the refusal of decision-makers to grant the 'benefit of the doubt' to issues that cannot be objectively verified and are not otherwise inconsistent with the narrative presented. It suggests poor understanding of how the standard operates, or a reluctance to engage with it altogether.

This approach (and the approaches identified below) further exemplifies the disbelief that exists in the credibility assessments of narrative evidence. The assertion of 'likely behaviour' (in both interviews and decisions) over examining whether the actual behaviour of LGB claimants deserves the 'benefit of the doubt' is one dimension of the acute disbelief in sexual identity-based claims. Not only is the self-identification of LGB claimants rejected, but also there is an absence of empathy for the way that LGB asylum-seekers express their identities in oppressive environments. This climate of intolerance results in choices that the privileged can dismiss as

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<sup>104</sup> UKLGIG, 'Failing the Grade' (n 100) 9.

<sup>105</sup> UKLGIG, 'Missing the Mark' (n 24) 21.

implausible. Thus, a poor grasp of the lived reality of diverse sexual identities contributes to the reluctance to engage the low evidentiary standards. Furthermore, disbelief and the scrutiny of LGB identities grant decision-makers the discretion to use ‘truth’ to dismiss narrative evidence that often deserves the ‘benefit of the doubt’.

## ii. Stereotyping

Stereotypes exist regarding the common attributes of all identity categories. The Home Office training is clear on the fact that stereotypes have no place in the decision-making on sexual identity-based asylum claims, as they are antithetical to the sexual diversity principle.<sup>106</sup> Stereotypes are also proscribed in the training on LGB claims:

The training is clear on the fact that people who are gay should not be expected to fit stereotypical perceptions of what it is to be gay. Interview questions would not therefore include questions about sexual activity or reflect stereotypical notions of what it means to be gay (FOI 27021).

This is emphasised with specific examples:

We do not expect people to go to gay pubs or clubs. We may expect people to be able to explain how they know they are lesbian or gay. They should be able to explain why they are attracted to their partner, or someone that they love (FOI27021).

Nevertheless, stereotypes regarding the ‘true’ nature and expression of sexual identity persist in the negative credibility assessments of LGB narrative evidence. They are used in the British asylum system to deny the authenticity of the claimant’s sexuality and, thus, the claim.<sup>107</sup> By way of example, the following factors have been taken as overwhelming indicators that a minority sexual identity is false: non-engagement in sexual relationships; lack of knowledge of gay bars, clubs, literature and

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<sup>106</sup> ‘Freedom of Information (FOI) Request 27021’, Home Office, Families and Gender Team (9 December 2013) 29.

<sup>107</sup> Sabine Jansen and Thomas P. Spijkerboer, ‘Fleeing Homophobia. Asylum Claims Related to Sexual Orientation and Gender Identity in Europe’ (*COC Nederland/VU University Amsterdam*, 2011) 57.



organisations; the failure to know the correct names of such LGB venues; the inability to disclose the full names and details of their sexual partners; and the lack of conflict between an individual's sexuality and culture or religion.<sup>108</sup> The Chief Inspector of Borders and Immigration's independent investigation in 2014 found that stereotyping was used in one fifth of LGB claims examined, bolstering this criticism of the British asylum system.<sup>109</sup>

The empirical data supported the persistent reliance on stereotypes to deny the veracity of sexual minority identities and claims. Most concerning was that these stereotypes contained prescriptions not only on the traditional expressions of sexual identity, but also on the demeanour and presentation of LGB individuals. Decision-making should have evolved beyond such basic essentialisms of sexual identity when the guidance and training has:

Do you go to Pride, do you know about Pride? You know, those are the ridiculous questions they ask. My friend told me they asked a friend of hers if she knew Oscar Wilde and that kind of rubbish. If they know about Alan Turing in Manchester. If they know Manchester, so if they go to clubs, if they go to gay establishments and all that (FASY001).

The response of FASY001, a Gambian female asylum-seeker, demonstrates reliance on stereotypes regarding the correct, i.e., 'true' expression of sexual identity by genuine minorities within the British asylum system. Framing stereotypes according to British culture is especially counterproductive, as asylum-seekers may not subscribe to them. Additionally, if someone is seeking refuge from persecution, safety is the ultimate priority, not sexual expression.<sup>110</sup> This is especially true for survivors of trauma or torture. Furthermore, practical issues, such as poverty, also dictate an LGB claimant's expression in the UK, as discussed earlier.<sup>111</sup> Thus, it is unlikely that many asylum-seekers would have an advanced knowledge of 'LGBT

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<sup>108</sup> UKLGIG 'Missing the Mark' (n 24) 14-18.

<sup>109</sup> Independent Chief Inspector of Borders and Immigration (n 78) 32-33.

<sup>110</sup> Interview with MASY004.

<sup>111</sup> UKLGIG, 'Missing the Mark' (n 24) 14.

life' within the UK.<sup>112</sup> Moreover, not all LGB people attend bars, clubs, pride events or read Oscar Wilde, which the Home Office guidance acknowledges, but decision-makers fail to implement.<sup>113</sup>

The empirical data also raised the existence of stereotypes based on demeanour and physical appearance:

Well the first judge said to me, 'oh, you don't look like a lesbian! You don't dress like a lesbian'. What I had on that day, I had on my jeans and my top, my pullover and my slacks. And he said to me I don't look like one [a lesbian], I don't dress like one. So I was just asking, 'what does a lesbian look like and what does a lesbian dress like?' I don't know (FASY002).

The experience of FASY002 is surprising for two reasons. First, these comments were made by a tribunal judge and, secondly, the reliance on stereotypes regarding the appearance of sexual minorities has been criticised and debunked thoroughly within the British asylum system over some years.<sup>114</sup> The persistence of such logic exemplifies why the training of immigration judges is equally important.

As Walker describes, the power dynamics of the asylum process dictate that some 'violence' is carried out by the system against claimants (and inevitably accepted) for them to obtain refugee protection.<sup>115</sup> Certain practices, such as the use of stereotypes, are characteristic of the 'homogenising tendencies' of the West.<sup>116</sup> Diverse experiences of sexual identity are negated in order to assimilate the 'other' into the dominant 'gay and lesbian' Western culture and perpetuate the supremacy of the 'hetero/homo' binary.<sup>117</sup>

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<sup>112</sup> *ibid* 15.

<sup>113</sup> 'API: Sexual Orientation Issues' (n 13) 10; 'FOI 27021' (n 106) 24-25.

<sup>114</sup> Millbank, 'Ring of Truth' (n 53) 7-11.

<sup>115</sup> Walker (n 22) 589-591.

<sup>116</sup> *ibid*.

<sup>117</sup> *ibid*; Thomas P. Spijkerboer, 'Querelle asks for asylum' in Peter Fitzpatrick and James Henry Bergeron (eds), *Europe's Other: European Law Between Modernity and Postmodernity* (Ashgate, 1998) 207-213; Audrey Yue, 'Colour Me Queer: Some Notes Towards the NESBian' (1996) 55(1) *Australia Queer: Meanjin* 87, 88.

From those who have been forced to conceal their sexualities, the system demands the presentation of coherent and congruent narratives, alongside ‘approved’ expressions of minority sexual identity. This is a difficult prospect where claimants are still constructing their sexual identities. The fractured nature of LGB asylum-seeker identities is a fundamental issue.<sup>118</sup> It is linked to the argument that a claimant’s narrative is more likely to be accepted as true if it is compatible with the framework of what decision-makers accept to be a likely story.<sup>119</sup> Complete, harmonised identities are acceptable, not those which cannot also be presented and understood comprehensively. Invariably, the terms of reference are based on the identities of white gay males living in the West. MASY003 articulated this in terms of the poor understanding that decision-makers held of persecuted identities. Upon obtaining the security of a safe haven, LGB asylum-seekers were not always interested in the ‘open’, unrestricted expression of their identities, but in healing:

On asylum-seekers, they should know that we have [had] a lot of bad experience[s] and it takes time for us to heal. But they want us to, just as soon as you reach England, it become[s] like you put on new clothes immediately, go to your room and put on new clothes. It can never happen like that. People take even over 20 years or 10 years [to express themselves freely] (MASY003).

A practitioner within the empirical data also explained this. Although aware of the stereotype that LGB claimants would openly express their identities in the UK, through engagement with LGBT bars and clubs, support groups and the consumption of LGBT literature, some claimants clearly did not fulfill such expectations. Some held negative self-images, which prohibited the presentation of identities that the Home Office could recognise:

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<sup>118</sup> Laurie Berg and Jenni Millbank, ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants’ (2009) 22(2) *Journal of Refugee Studies* 195-223, 195-205. See also, ‘API: Sexual Orientation Issues’ (n 13) 10, which addresses this more abstractly, in terms of the ‘shame and stigma’ claimants may still feel about their sexual identities.

<sup>119</sup> Dauvergne and Millbank (n 87) 305.

I'm just thinking back of a young man from Lebanon whose views on himself were awful. He couldn't bear to live with himself and he self-harmed and everything. It was about how he felt about being gay. For some clients, this is an important part of their case, because it explains perhaps why they haven't been out more or why they haven't got more of an identity that is immediately accessible to the UKBA. So maybe you don't have a client who can name ten gay clubs, but they don't because they haven't come to terms with who they are (Liz Barratt).

The British asylum system must appreciate that relying on stereotypes to promote what decision-makers consider to be 'true' or correct expressions of sexual identity is a flawed approach. This is so due to the diversity of sexual identity, the impact of oppressive home societies on the identity development, and intersectional factors that inform individual conceptions and expressions of sexual identity. Sexual identity is so broad and complex that it may be difficult, in some circumstances, for decision-makers to understand the connection between one's sexual identity and its expression. This is linked to Millbank's arguments regarding the way in which even seemingly peripheral expressions of one's sexual identity could somehow 'reveal the stigmatised identity'. These issues are also linked to intersectionality, which is explored in-depth below.

### iii. Ignorance of Intersectional Factors

In many cases the reasons for finding poor credibility could be overturned with a better understanding of intersectional factors, such as the interrelation of sexual identity with a claimant's culture, education or religion.<sup>120</sup> Moreover, ignorance of intersectional explanations goes against the ethos of Home Office guidance.<sup>121</sup> An example of good practice, intersectionality was emphasised by an immigration judge in a claim examined by the UKLGIG.<sup>122</sup> The judge cited the case of *HK v. SSHD*<sup>123</sup> and stated:

<sup>120</sup> Berg and Millbank (n 118) 207-208.

<sup>121</sup> 'API: Considering Asylum Claims and Assessing Credibility' (n 14) 14.

<sup>122</sup> UKLGIG, 'Missing the Mark' (n 24) 15.

<sup>123</sup> *HK v. Secretary of State for the Home Department* [2006] EWCA Civ 1037.

It was made clear that the social and cultural background from which an asylum claimant has come is likely to be very different from the background with which a Tribunal Justice is perfectly familiar. It may be very dangerous to characterise as implausible, behaviour which seems so against a United Kingdom background, when it may not be so at all against the background of the claimant's home country.

The empirical data revealed decision-maker disregard for intersectional considerations. FASY003, a Pakistani lesbian, was denied refugee protection at the appeal stage because the immigration judge did not consider the globalised nature of contemporary society, or the fact that English was an official language of Pakistan. The interviewee dismissed this robustly:

When I was refused in the first instance, I went to an appeal. There, the judge, what can I say, was awful. In his refusal he said, 'oh, she claims that she does not speak English, but she spoke a few words, e.g., "accept" and "naturally"'. And tell me, in Pakistan, we used to watch [American] TV and movies, the way that the media works now, even an uneducated person would be able to say something in English, at least "please", "thank you", even those who haven't been to school (FASY003).

In an example cited by a professional within the empirical data, the Home Office decision-maker failed to grasp the cultural mores of the claimant's home society and its impact on his conduct. What appeared to disprove the claimant's sexuality was his attempt to insulate himself from persecution on that very basis:

A case recently, a guy married three times and that completely went against him because it could be quite expected that he married once, but not three times. But if you read about the hierarchy in his clan, what was expected of him, he kept marrying to create a safety net for him (Professional Participant A).

A claimant's educational background is often critical to his or her ability to provide an asylum narrative that a decision-maker can recognise as believable and deserving of protection:

I don't want to single countries out too much, but actually, yeah, I'll be honest. Like say, Jamaican men, you do come across some Jamaican men who can do it [provide a coherent account], but there is a big group of Jamaican men that the education system is very poor, they've often felt like they were really kind of pushed out of it. Anyhow, they often haven't accessed anything, and they can find it incredibly difficult to give a coherent account – coherent in the sense that a British person would think about it (Barry O Leary).

Poor education was cited by one asylum-seeker to explain why she struggled with the demands of the asylum procedure:

I was just from a small village, I was a proper village girl. That's what I am saying, that for a village girl, this is too much. They asked me, 'if you came on 7<sup>th</sup> January and you claimed on 11<sup>th</sup> January, why was this?' But I have come from a village, I don't know anything, a person of God may have sent me here, taking pity on my life, but I don't know what to do. And this happens very often with lots of people. They don't know the ways, the roads to take (FASY003).

It is equally pertinent that FASY003 was unable to articulate any coherent sexual identity beyond being a woman who was not attracted to men (Chapter three). Educational and cultural factors were also almost certainly to blame for the fact that FASY002, a Jamaican lesbian, claimed asylum some time after her presence in the UK. Prior to claiming asylum, she simply had no knowledge of the possibility to seek asylum, something that the British asylum system was unwilling to accept:

Because I take [took] so long to seek asylum and they were saying, why didn't I seek asylum when I first came in the country. I explain[ed] to him and said, I didn't know nothing [anything] about asylum when I came in this country.

Where I am from, when you talk about asylum, they talk about being mental and locked up. But asylum never really crops up in subjects, questions or any conversation that I have [had] until I was talking to my friend and she would say, this is what you have to do (FASY002).

A delay in claiming asylum was a common ground for disbelief within the empirical data. Anecdotally, the researcher is experienced with the Home Office's approach to such issues. In their determinations refusing asylum claims, decision-makers 'copy and paste' generic assertions that, since claimants were well informed enough to enter the UK, they should have known of the asylum system.

The Home Office's approach to the apparent conflict between religion and sexual identity was also raised within the empirical data. The training on LGB issues covers this issue, requiring religious claimants to address the impact of their sexuality on their faith:

If they have a religious faith, how does your sexuality affect your religious views? This is something they will probably have considered if they are gay. If they cannot provide an answer, it may imply that they are not really gay. We would have to ask them why they have not considered this.<sup>124</sup>

As stated, the content of the training materials contain the expectation that religious sexual minorities must justify holding a faith, reflecting the stereotype that religion and sexuality are inherently incompatible. This is highlighted by the erroneous conclusion that if a claimant has not considered the necessary tension between religion and sexuality, they may not be telling the truth. Yet, this fails to appreciate that many sexual minority claimants may not present fully realised or harmonised identities, because the process of development is on-going, or because they consider the different facets of their identity to engage separate domains of their being, as highlighted by MASY007 below.

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<sup>124</sup> 'FOI 27021' (n 106) 26.

The UKLGIG criticised the decision-making on this issue, with both caseworkers and judges often questioning claimants from the perspective that religion and sexuality is incompatible: ‘Why did you believe God would accept your sexuality when it goes against what Ugandan religious and societal leaders would preach?’<sup>125</sup> In the case of a Ugandan woman, she was repeatedly pressed to answer why she did not ‘confess her sexuality to a priest’, a projection of the interviewer’s assumptions about religion onto the claimant.<sup>126</sup> Within the empirical data, two asylum-seeker participants had two different responses to this question. MASY007 welcomed the question as an opportunity to present his ideas on the intersection of religion and sexuality, or in his case, how he believed them to exist as independent forces in his life:

She asked me if I was Muslim and I said yes, and she asked how I could be gay if I was Muslim. And I told her that these are two different questions, being gay has nothing to do with being Muslim, just as being Muslim has nothing to do with being gay (MASY007).

By contrast, FASY007 was offended by the presumption that there is an inherent conflict between religion and sexuality, which LGBT people of faith must reconcile:

Offensive, very offensive. Asking me how do I justify my sexuality with God. And I just felt he was very, very offensive in that way, you know. And I was appalled to know that these people can even afford to ask such questions (FASY007).

An examination of these responses highlights that it is not the subject of the question that is the problem. Indeed, allowing claimants to present their relationships with religion (if they have any) can be an important and revealing aspect of their narrative evidence. Prejudicial questioning on this topic, however, may prevent genuine and open narratives, or may limit a claimant’s disclosure, as evidenced by the empirical data. So it is critical that the question be phrased neutrally and devoid of any presumptions or prior judgements. In this way, irrespective of whether the claimant

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<sup>125</sup> UKLGIG, ‘Missing the Mark’ (n 24) 15.

<sup>126</sup> *ibid.*



has considered this question or holds a positive relationship with religion, a claimant can be empowered to respond to it authentically. Practically, the researcher has anecdotal experience of decisions refusing refugee protection because the claimant has not provided a satisfactory answer on this conflict, undermining the credibility of his or her identity. Perhaps it is revealing that MASY007 was granted asylum by the Home Office within weeks of his substantive interview, whereas FASY007 was refused.

Consequently, there are signs that the British asylum system confuses believability and truth in two significant ways. The first is that the system places too much discretion in the hands of the decision-maker. The guidance demonstrates this. Even the 2015 instructions describe the assessment as whether the ‘caseworker accepts what he or she has been told’, rather than the overall believability.<sup>127</sup> The articulation of the assessment allows excessive decision-maker discretion and, thus, greater inconsistency. Even the former decision-maker interviewed for this thesis seemed unable to distinguish between the reasonable believability of a claim, and the decision-maker’s personal belief in the claimant:

Credibility is saying, I believe you or I don’t believe you (Former Home Office decision-maker).

There is a difference between a claim being believable and a decision-maker expressing personal belief in that claim. The latter is more subjective, offering ‘unstructured discretion’ to decision-makers,<sup>128</sup> to a degree that is unique to LGB claims:

It’s only in LGBT cases that people, judges and decision-makers, think that they can draw upon their own brilliance to determine somebody else’s sexuality (Liz Barratt).

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<sup>127</sup> Millbank, ‘The Ring of Truth’ (n 53) 22.

<sup>128</sup> Sweeney (n 4) 705.

Indeed, the second significant way in which the system confuses believability with truth relates to the rejection of LGB claimants' self-identification of their sexual identity. Lord Rodgers' test in *HJ (Iran)* advocates for decision-makers to scrutinise the veracity and, thus, the truth of the claimant's sexuality.<sup>129</sup> Both of these issues are exacerbated by the 'culture of disbelief' that is prevalent within the institutions of the British asylum system. In fact, the UKLGIG found that, between 2011 and 2013, 85% of rejected sexual identity-based claims that were examined cited the disbelief of the claimant's sexuality.<sup>130</sup> Moreover, 60% of such claims were refused on similar grounds at tribunal level.

It is clear from examining the British asylum system's credibility assessments of narrative evidence in LGB claims that the current approach is unfair. The assessments are inconsistent with the structural principles, because the British system distorts the correct evidentiary standards by prescribing what it considers to be the 'truth' in LGB narratives. Yet, the evidentiary standards are concerned not with the truth, but with believability. The injection of truth into the credibility assessment of narrative evidence imposes a higher standard of proof than intended by the 'benefit of the doubt'. This is engendered by a dismal combination of discretion regarding the decision-maker's personal belief, and the refusal culture embedded by Lord Rodgers in *HJ (Iran)* to scrutinise the veracity of the claimant's sexual identity. A truth-oriented approach does not provide the scope for decision-makers to apply these low evidentiary thresholds meaningfully. Consequently, claimants are denied asylum on the basis of inconsistencies that hold little, if any, weight, as this exploration has demonstrated.

The role of the 'culture of disbelief' in the misapplication of the evidentiary standards (see also, Chapter three on COI) highlights the breach of a second structural principle, namely the requirement of an impartial asylum procedure. Additionally, this particular investigation concretises the fundamental disconnect between the commendable guidance and the reality of decision-making that has characterised much of this thesis's investigation so far. Therefore, the British system's failure to

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<sup>129</sup> *HJ (Iran)* (n 12) [85] (Lord Rodgers).

<sup>130</sup> UKLGIG, 'Missing the Mark' (n 24) 12.

satisfy the structural principles relating to the citation and application of accurate guidance and impartiality are examined separately below.

#### iv. The Relationship Between Guidance and Practice in Credibility Assessments

There is an additional dimension to the partiality within LGB asylum claims that is reflected within the conflict between guidance and practice. On many of the issues explored in this thesis, there exists good guidance from the Home Office, but this does not prevent poor assessments. The guidance cited above on credibility assessments and the idea of ‘truth’ is but one example. Whilst praising the quality of the Home Office guidance, the empirical data highlighted the real problem, i.e., that decision-makers consistently failed to use it:

So the API is not bad – I mean, I’m sure you’re familiar with it, and obviously it’s had input from good people. It talks about things like shame, stigma, late disclosure, difficulties people might have, so I think that’s a really good starting point, but the reality is that it’s just not – nobody pays any attention to it (Catherine Robinson).

The empirical data also accentuated the wastefulness of such disregard for good guidance, in terms of the discard of time and resources, at the expense of a fairer, more efficient and less expensive asylum system:

I offer so many opinions in Ugandan and Cameroonian claims, and I repeatedly ask myself, ‘Why is it I’m still doing this?’ Because you’ve got the API on credibility, the API on sexual orientation, you’ve got an OGN that acknowledges that gay men and women may be at risk. The OGN says ‘have regard to the APIs’, and yet, I see a refusal decision that will argue this individual’s sexuality is in doubt. Despite evidence that they’ve offered, despite statement that you’ve given, and then the individual caseowner will offer their own interpretation... without any specific regard to the OGN or APIs, and I think that’s a matter of great concern because the waste there in terms of time and resources is just very, very frustrating (Paul Dillane).

As with other issues analysed in this thesis, the problem with credibility assessments is multi-layered. First, the determinations of LGB asylum claims are procedurally unfair under the structural principles, because they fail to cite and apply the guidance, which, on the whole, is good, despite some scope for improvement. The determinations are also substantively unfair, as they result in departures from the correct evidentiary standards. The guidance is not the biggest problem, but rather the disregard that many decision-makers have for it, resulting in poor quality and unfair decisions. Yet again, the cause of the unwillingness to apply the guidance lies in the structural principle mandating impartiality: the broader culture of the asylum system and the way that this culture facilitates disregard for the quality and fairness in decision-making. The Supreme Court's guidance in *HJ (Iran)* has only intensified and concretised this disbelief in LGB claims.

Within the initial Freedom of Information request made to the Home Office, the researcher queried whether there were mechanisms in place to prevent the 'personal opinions of case-owners from affecting the outcome of a case'.<sup>131</sup> In response, the Home Office asserted that there were several safeguards in place, such as the 'management supervision and performance management processes', of which no further detail was given.<sup>132</sup> It also stated that 'an effective quality audit process' was implemented, which audited 5% of all interviews and decisions.<sup>133</sup> The Home Office contended that these safeguards allowed them to pick up 'inappropriate handling of cases' speedily, yet this has not taken place. These safeguards are not working. On credibility assessments, for example, this investigation has highlighted issues regarding stereotyping and pronouncements on plausible behaviour. These have persisted within the British asylum system since before *HJ (Iran)*, and even after reports from UKLGIG, Women's Aid and Amnesty International addressing such problems.<sup>134</sup> Furthermore, these reports have highlighted the extremely gendered nature of prejudicial treatment, with the refusal rates of female applicants being far

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<sup>131</sup> 'FOI 27021' (n 106) 8-9.

<sup>132</sup> *ibid.*

<sup>133</sup> *ibid.*

<sup>134</sup> Amnesty International and Still Here, Still Human, 'A Question of Credibility: Why So Many Initial Asylum Decisions Are Overturned on Appeal in the UK' (April 2013); Asylum Aid, 'Unsustainable: The Quality of Initial Decision-Making in Women's Asylum Claims' (January 2011).

higher.<sup>135</sup> This conclusion is mirrored in the case of sexual minority women, as highlighted at many instances within the analytical chapters of this thesis. If, as the Independent Chief Inspector reported, one in five LGB determinations relied on stereotyping, it is clear from their persistence that the internal safeguards have not worked. This raises questions regarding the effectiveness of these safeguards or their actual implementation.

In the response to the Freedom of Information request, the Home Office also cited a third procedural safeguard in the handling of LGB asylum claims, namely the ability to appeal against a refusal to the courts for reconsideration.<sup>136</sup> This allowed claimants to raise issues regarding inappropriate handling for consideration by immigration judges. This links to an important contribution made within the empirical data by the former Home Office decision-maker:

The problem, as I personally saw it, was that such was the pressure on caseworkers and caseowners to make a sufficient number of decisions for their team, to have made their allocated number of decisions in a week, and hit the target, so that the minister could stand up and say, ‘We have made this many decisions’. I’m not saying that any decision is better than no decision, but there’s always at the back of people’s mind a failsafe, that if I make the wrong decisions and it’s refused, well it’ll go to court, and the person will appeal, and the judge will grant them. Well that’s a very expensive and inefficient process (Former Home Office decision-maker).

Again, the investigation raises the issue that unfair initial decision-making leads to an expensive and inefficient asylum system.

Individual decision-makers also perceive the Immigration and Asylum Chamber as a safeguard in the same way that the Home Office does as an institution. They allow immigration judges to rectify their poor decision-making made as a result of the

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<sup>135</sup> *ibid*, Asylum Aid, 13. The allowed appeal rate was 35-41% for women and 26% for men, demonstrating the higher number of deserving female claimants being denied protection at first instance.

<sup>136</sup> ‘FOI 27021’ (n 106) 8-9.

target-oriented pressure. Indeed, of the claims surveyed by the UKLGIG, 32.5% of disbelieved claims were allowed at the appeal, with the tribunal believing their sexual identities.<sup>137</sup> This is an extremely problematic safeguard; not only is it expensive and inefficient, as underscored by the empirical data, but the unfair decision-making at tribunal-level highlights that it is also an inadequate safeguard.

Having examined the most important part of the asylum claim – the credibility assessments of documentary and narrative evidence – it is clear that the British asylum system’s approach is unfair. First, there is a distortion of the evidentiary standards. Instead of being applied with their inherent flexibility, documentary evidence is used to increase the evidentiary burden upon claimants, making it harder to meet standards that are intentionally low (see also Chapter three on evidentiary standards in relation to COI). Through rigid, essentialised conceptions of sexuality, flaws are found within the provision of documentary evidence and the quality of narrative evidence to exclude deserving LGB claimants from refugee status. Second, the consequence of distorted evidentiary boundaries is the lack of respect for LGB rights, overlooking the desperate measures taken by claimants to meet the artificially heightened burden of proof.

Thirdly, it is clear that the inflexible and exclusionary approach to the evidentiary standards in credibility assessments is fuelled by impartiality within the system. The prevailing ‘culture of disbelief’, especially the disbelief of a claimant’s sexuality that is entrenched by *HJ (Iran)*, has resulted in unfair treatment. Consequently, exemplary guidance is ignored, in favour of rejecting claims through stereotypes and poor reasoning. Fourthly, legal representatives are forced to take steps that are not in their clients’ interests; representatives are often equally desperate to do what is necessary to surmount the system’s increasing barriers against LGB claimants. Finally, on issues of memory, for example, the guidance and training is lacking.

Through this investigation it becomes apparent, however, that whilst it is necessary to identify how the British asylum system is unfair, simply doing so will not provide immediate answers to the necessary improvements. The existence of a disconnect

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<sup>137</sup> UKLGIG, ‘Missing the Mark’ (n 24) 12.

between guidance and practice, the Home Office's inadequate procedural safeguards, and pressures upon decision-makers to meet case resolution targets provide insight into the complexity of this task. What is most concerning, however, is the pervasive nature of the 'culture of disbelief' in all areas of the RSD, both in substantive areas, such as the objection verification of the fear of persecution (the use of COI in Chapter three) and in procedural areas, such as the credibility assessment. It suggests that until the political and structural concerns associated with this can be meaningfully addressed, there appears to be little hope of eliminating the inconsistent and unfair credibility assessments of documentary and narrative evidence. Sexual identity-based asylum claims, as arguably the least understood and some of the most complex asylum claims due to the internal nature of sexual identity, become some of the easiest to reject.

### 3. Detention and Accelerated Procedures

This chapter now turns to examine the use of detention and accelerated procedures in LGB asylum claims. Detention is the primary tool by which the British asylum system exerts control over those without immigration status in the UK. Detention is used to establish the identities of detainees, finalise their immigration cases, or to enable their removal.<sup>138</sup> The use of detention and removal centres to hold asylum-seekers and other migrants is said to be 'an essential element to immigration policy' within the British asylum system.<sup>139</sup> Indeed, the UK detains more asylum-seekers and holds them for longer than any other European state.<sup>140</sup> Thus, for these reasons and the fact that detention formed a fundamental part of the experiences of the asylum-seeker participants of the empirical data, examining the detention of LGB asylum-seekers is a critical facet of investigating procedural fairness within the British asylum

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<sup>138</sup> Stephanie J. Silverman and Ruchie Hajela, 'Immigration Detention in the UK' (*The Migration Observatory at the University of Oxford*, 6 February 2015).

<sup>139</sup> Home Office, 'Secure Borders, Safe Haven: Integration with Diversity in Modern Europe' (*HMSO*, February 2002) para 4.74. See also, Margaret S. Malloch and Elizabeth Stanley, 'The Detention of Asylum Seekers in the UK Representing Risk, Managing the Dangerous' (2005) 7(1) *Punishment & Society* 53-71.

<sup>140</sup> Immigration Law Practitioners' Association (ILPA), 'ILPA's Response to Secure Borders, Safe Haven' (2002).

system. As part of this, there are two aspects of detention to consider: first, the impact of detention on LGB asylum-seekers, and secondly, the use of accelerated determination procedures, i.e., the ‘Detained Fast-Track’ system, in sexual identity-based asylum claims. Each of these can impact the extent to which LGB claims are dealt with fairly, for reasons outlined below.

### 3.1 The Detention of LGB Asylum-Seekers

The power of immigration officials to detain individuals is derived from the Immigration Act 1971. In schedule 2, paragraph 16, it outlines the power to detain: those ‘subject to immigration control’, such as those arriving in the UK whose leave to enter requires examination; those whose leave to enter has been denied; illegal entrants and those suspected of being so; and those liable to administrative removal.<sup>141</sup> Under the Immigration and Asylum Act 2002, these powers were extended so that the Secretary of State obtained the power to detain individuals.<sup>142</sup> The Home Office has provided guidance on its policy with regard to detention, highlighting that the purpose of utilising detention is ‘maintaining effective immigration control’.<sup>143</sup> The courts have emphasised that detention must be utilised in accordance with Home Office policy.<sup>144</sup>

The Home Office’s policy is that detention is generally utilised to facilitate removal, ‘establish a person’s identity or basis of claim’, or where it is reasonable to believe a claimant will abscond.<sup>145</sup> It maintains a ‘presumption in favour of temporary admission or release’ and tries to exhaust the alternatives to detention before making a decision in favour of it.<sup>146</sup> Policy states that ‘detention must be used sparingly, and for the shortest period necessary’.<sup>147</sup> It also acknowledges the inappropriateness of detaining individuals for lengthy periods. Factors influencing a decision to detain are

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<sup>141</sup> Immigration Act 1971, schedule 2, para 16.

<sup>142</sup> Immigration and Asylum Act 2002, s.62.

<sup>143</sup> Home Office, ‘Chapter 55: Detention and Temporary Release’ Enforcement Instructions and Guidance (6 July 2015) 55.1.

<sup>144</sup> *R v. Special Adjudicator and Secretary of State for the Home Department, ex parte B* [1988] INLR.

<sup>145</sup> ‘Chapter 55’ (n 143) 55.1.

<sup>146</sup> *ibid.*

<sup>147</sup> *ibid.*



also listed in the policy document. They include the ability to facilitate a quick departure; evidence of absconding or not complying with the terms of release; breach of immigration laws; compliance with the terms of previous leave; the claimant's ties to the UK; the status of the claimant's immigration case; risk of harm to the public; age; and histories of trauma or ill-health (mental or physical).<sup>148</sup> The considerations involved in a decision to detain are, therefore, lengthy and detailed. In practice, however, the test that is often used by decision-makers to decide on detaining an individual is, 'is the applicant more likely than not to abscond?'<sup>149</sup> This suggests that maintaining 'control' over the individual is the primary goal of detention.

The detention of asylum-seekers is constrained by fairness, as documented in Chapter two. It is subject to considerations regarding length and suitability.<sup>150</sup> The Reception Directive specifies limits placed on the indiscriminate detention of migrants, for example. Article 17(1) states that Member States must consider the suitability of 'vulnerable people' for detention, such as victims of trauma and torture.<sup>151</sup> Although Article 17 is not specifically inclusive of sexual minorities, a flexible and dynamic definition of 'vulnerable people' would allow for LGB applicants to be considered vulnerable on the basis of their sexualities. This is due to the nature of their persecution (as documented in Chapter three) and the often-contentious treatment of sexual variance by other detainees, as this thesis contends below. Article 5(4) ECHR also enables asylum-seekers to challenge the legality of their detention. Accordingly, immigration detention is subject to regular review in the British asylum system.<sup>152</sup>

Although policy states the use of detention as a last resort and for the minimum time possible, detention is a critical facet of the British asylum system. The role it plays has increased through the enhanced rhetoric around immigration that perceives

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<sup>148</sup> *ibid* 55.3.1.

<sup>149</sup> Emily Burnham, 'Challenging Immigration Detention: a Best Practice Guide' (*Bail For Immigration Detainees*, October 2003) 26.

<sup>150</sup> Home Office, 'Asylum Policy Instruction: Detained Fast-Track Processes' (2 November 2014); 'Chapter 55' (n 143) 55.1.

<sup>151</sup> 'Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States' (Reception Directive) (6 February 2003), OJ L. 31/18-31/25, art 17.

<sup>152</sup> 'Chapter 55' (n 143) 55.8.

migrants as posing a ‘risk’ to the ‘social, moral and economic well-being’ of the country.<sup>153</sup> As of January 2015, the UK has the capacity to hold 3,915 detainees at a time.<sup>154</sup> Detention is governed by the Detention Centre Rules 2001, which aims to ensure the humane treatment of all detainees.<sup>155</sup> Yet, detention remains contentious for allowing detainees to potentially be detained ‘indefinitely’<sup>156</sup> and for its health impact on detainees’ mental well-being.<sup>157</sup> Consequently, the 2015 Joint Inquiry by the All Party Parliamentary Group on Refugees and the All Party Parliamentary Group on Migration has sought to examine the fair operation of the UK detention programme.<sup>158</sup>

In the LGB context, detention appears to be a significant feature of sexual identity-based claims. Within the empirical data, 10 of the 20 asylum-seekers interviewed had experienced detention during the progress of their asylum claims.<sup>159</sup> If this represents, to some degree, the experiences of the LGB refugee community in the UK, it highlights that detention is a significant feature of sexual identity-based asylum claims. Dillane, a participant of the empirical research, corroborated this assessment in a news article, contending that the ‘Home Office is detaining increasing numbers of gay, lesbian, bisexual and trans people who seek asylum, often for weeks or months’.<sup>160</sup> For three reasons, this investigation finds that British detention practices with respect to LGB asylum-seekers are unfair and inconsistent with the ‘structural principles’ espoused in Chapter two. First, the screening procedure determining a claimant’s appropriateness for detention is inadequate. Secondly, detention often

<sup>153</sup> Malloch and Stanley (n 139) 54-55.

<sup>154</sup> HC Deb, 17 December 2014, cW.

<sup>155</sup> Detention Centre Rules 2001.

<sup>156</sup> Amelia Gentleman, ‘MPs call for end to indefinite detention of migrants’ *The Guardian* (3 March 2015) <<http://www.theguardian.com/uk-news/2015/mar/03/mps-call-end-indefinite-detention-migrants>> accessed 15 November 2015.

<sup>157</sup> Guy J. Coffey et al., ‘The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum’ (June 2010) 70(12) *Social Science & Medicine* 2070–2079.

<sup>158</sup> All Party Parliamentary Group on Refugees (APPGR) & the All Party Parliamentary Group on Migration (APPGM), ‘The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom’ (3 March 2015).

<sup>159</sup> FASY002; FASY004; FASY007; MASY002; MASY003; MASY004; MASY005; MASY006; MASY008; and MASY009. Of the ten claimants that experienced detention, three were female.

<sup>160</sup> Scott Robert, ‘MPs: LGBT asylum seekers face “bullying” and “abuse” in British detention centres’ (*Pink News*, 3 March 2015) <<http://www.pinknews.co.uk/2015/03/03/mps-lgbt-asylum-seekers-face-bullying-and-abuse-in-british-detention-centres/>> accessed 15 November 2015.

results in LGB claimants' fundamental rights being denied, and thirdly, is inherently inhumane within this particular context. This section will now explore each of these reasons in turn.

### *3.1.1 Inadequacy of the Screening Process*

The practice of immigration detention is constrained by a number of internal and external caveats. For example, the International Covenant on Civil and Political Rights accentuates that detention must not be 'arbitrary'.<sup>161</sup> Although the treaty did not expand upon the definition of 'arbitrariness', arguably, arbitrariness in detention exists when there is 'inappropriateness, injustice and a lack of predictability'.<sup>162</sup> The process of determining an asylum-seeker's suitability for detention can take place at several different stages, by different immigration officers, depending upon the status of the claim. For initial asylum claims, officers at the screening interview are responsible for determining a claimant's suitability for detention.

Participants within the empirical research conducted for this thesis criticised the screening process for being inadequate for deciding whether a claimant was suitable for detention:

At the [screening] interview, you're not meant to give any in-depth information. So you're not asked, for example, 'are you a torture survivor?' However, if you are, you shouldn't be detained. So first you get detained, then you have to declare that you're a torture survivor and shouldn't be there at all. It's like, okay, a screening officer doesn't have to have any training, anybody can be a screening officer. Anybody can be one. You're just asking questions and ticking boxes, and then you ring upstairs and say, 'Have you got any space in detention?' (Erin Power).

Power contended that the practice of detaining LGB claimants at the initial stage of their claim was arbitrary. The decision to detain asylum-seekers is made by screening

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<sup>161</sup> International Covenant on Civil and Political Rights, United Nations, Treaty Series, Vol. 999, P. 171 (Entered into Force on 23 March 1976) art 9.

<sup>162</sup> Alexandra Olsen, 'Over-Detention: Asylum-Seekers, International Law, and Path Dependency' (2012) 38 Brook. J. Int'l L. 451, 466.

officers, who lack the training and skills to make the important decision of whether a claimant is appropriate for detention. Moreover, the screening interview, which contains standard questions regarding the claimant's nationality and entry into the UK, does not ask the questions necessary to determine a claimant's suitability for detention.<sup>163</sup>

Due to the screening interview's inadequacy, the role of legal representatives is heightened. In this instance, representatives were forced to pre-empt the tendency to detain sexual minorities. Representatives provided certain clients with letters to present to screening officers. These letters stated that they could not be detained because they were victims of torture or trauma:

I went with a letter from my legal representative explaining to them that I should not be detained because of my past trauma (FASY005).

The response to these, however, varied. At the screening stage FASY005 and FASY002 were not detained (FASY002 was detained at a later stage). By contrast, the screening officer ignored MASY006's letter altogether:

My solicitor already mentioned in her letter, 'Don't detain him' because of my situation I am facing back home and everything, but still they detain[ed] me (MASY006).

The empirical data further highlights the absence of the infrastructure (in terms of relevant questioning) or training for screening officers to make informed decisions about detaining LGB claimants. Both FASY007 and MASY006 were detained, despite being victims of torture. The Medical Foundation worked on both of their cases and the Home Office was provided with Medico-Legal Reports to support the claims of torture forming their narratives of persecution. These reports would not have been produced without their legal representatives not successfully obtaining their release from detention, as the Medical Foundation is not known to produce reports for detainees. At the time of conducting the interview, FASY007's legal

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<sup>163</sup> Asylum Aid, 'The Asylum Process Made Simple' (n 25).

representatives were pursuing a claim of damages against the Home Office. This is on the basis of her ‘unlawful detention’ as a victim of torture. The 2015 Parliamentary Inquiry into detention practice found that individuals with poor mental health were detained too often.<sup>164</sup> This was in disregard of the fact that detention is not ‘conducive’ to the treatment of mental illness. Furthermore, once detained, claimants unsuitable for detention struggled to secure their release.<sup>165</sup> Rule 35 reports, which are safeguards against the detention of vulnerable asylum-seekers, were often ineffective due to the Home Office’s failure to act on evidence that individuals were unsuitable for detention.<sup>166</sup>

Therefore, the screening process does not meet the standards of fairness expressed within the structural principles, specifically the principle relating to the application of relevant guidance. Although the policy guidance states that those with histories of trauma or ill-health should not be detained, the practice of screening officers fails to adhere to this. The screening process is unable to follow such guidance, as the infrastructure is not in place to determine the appropriateness of detaining a particular claimant. Equally importantly, it fails another principle regarding respect claimants’ fundamental rights relating to the Article 3 and Article 5 ECHR (prohibiting inhuman treatment and securing the right to liberty and security). This argument is examined further below.

### *3.1.2 Detention Denies Fundamental Rights*

The second reason for the unfairness of detention practice under the British asylum system is the deprivation of asylum-seekers’ fundamental rights. These include the right to health-care, the right to legal representation, and the punitive impact of detaining LGB asylum-seekers.

#### *i) Healthcare*

On many aspects of the British asylum system, the empirical data identified the neglect of claimants’ well-being. Within detention, FASY002, a Jamaican lesbian,

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<sup>164</sup> APPGR and APPGM (n 158) 56.

<sup>165</sup> *ibid* 61.

<sup>166</sup> *ibid*.

raised the issue of poor quality healthcare. She found that not only did the nurse change the dates on her records to undermine the severity of her mental health, but also relied on stereotypes regarding poor mental health to deny that she was unwell:

I suffered from a seizure just before I got out. And I went to the medic and the man said to me that I do not look depressed; I attire myself properly, I am clean, my face does not look like someone depressed. I asked for a copy of my medical report, they changed some dates on my thing. They put the last time I have seen my doctor as 2010, and I was like, 'no'. The last time I saw him was in April 2013, before I went there in June... I asked the doctor inside when I last saw my GP and he said April 2013. I asked my doctor in there, what does a depressed person look like? He's giving me all sorts of stories, but he still can't tell me what a depressed person looks like (FASY002).

The healthcare operative stated that she did not appear to be sick, because she was 'appropriately dressed' and was able to go to the gym. FASY002 explained that exercise helped her to maintain her emotional and mental well-being whilst detained; it was not proof that she did not suffer from depression.

The role of detention as an aggressor and creator of trauma (section 3.1.3 (ii) below) is exacerbated by the fact that detention dehumanises detainees by ignoring their mental health needs.<sup>167</sup> The provision of healthcare, particularly in relation to mental illness, is extremely poor. The inadequate funding and provision of medical support in detention is motivated by the refusal culture and the categorisation of asylum-seekers and other migrants as economic burdens.<sup>168</sup> As contended by Stevens, such inadequate provision of healthcare services also perhaps relates to the fact that the provision of medical services within detention centres is outsourced, alongside their management.<sup>169</sup> Consequently, private medical companies, such as Drummonds

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<sup>167</sup> Physicians for Human Rights, 'From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers' (Asylum Network, 2003).

<sup>168</sup> Mary Salinsky and Susi Dell, 'Protection Not Prison: Torture Survivors Detained in the UK' (*Medical Foundation for the Care of Victims of Torture*, 2001) 15-16. See also, Yarl's Wood Independent Monitoring Board, 'Annual Report 2014' (2014) 10-12.

<sup>169</sup> Dallal Stevens, 'Asylum-Seekers and the Right to Access Healthcare' 61(4) NILQ 363-90, 379.

Medical Support Services and Serco Health, are responsible for addressing the medical needs of detainees.

The neglect of detainees' well-being is also reflected in reports from a former Serco employee.<sup>170</sup> The former employee claimed that mental health concerns were not taken seriously in detention centres. Even when deciding to deport individuals, appropriate assessments were not carried out due to the assumption that detainees were deliberately exacerbating their conditions.<sup>171</sup> The same employee also reported the sexual abuse of detainees by a health worker. Such reports severely undermine the credibility of the internal and external assurances mentioned below. By way of example, the whistle-blower stated:

The lack of engagement with mental health in relation to assessment and safeguards was very concerning. They weren't doing assessments to rule out mental health, the ACDT [Assessment Care in Detention and Teamwork] documentation wasn't getting filled out properly. God knows how many people they had deported without a proper assessment.<sup>172</sup>

Serco refuted the accusations. The Home Office did too, relying on the HM Chief Inspector of Prisons' report, which found that 'there was good primary mental health provision' at Yarl's Wood.<sup>173</sup> Yet, the 2015 Parliamentary Report has also reinforced the relevance of the issue by finding inadequate healthcare in detention centres, in terms of the initial assessments by GPs, hospital treatment, delayed receipt of necessary medication, and infringements upon the privacy of detainees.<sup>174</sup> Such incidents reflect the widespread refusal culture, which even affects the provision of

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<sup>170</sup> Mark Townsend, 'Serco Whistleblower's Yarl's Wood Sex Claim' *The Observer* (24 May 2014) <<http://www.theguardian.com/uk-news/2014/may/24/serco-whistleblower-yarls-wood-pressure-immigration>> accessed 9 September 2015.

<sup>171</sup> *ibid.* See also, Phil Miller and Claire Sambrook, 'The National Shame that is Healthcare in UK Immigration Detention' (*Open Democracy UK*, 12 October 2014) <<https://www.opendemocracy.net/ourkingdom/phil-miller-clare-sambrook/national-shame-that-is-healthcare-in-uk-immigration-detention>> 16 October 2015.

<sup>172</sup> *ibid.*

<sup>173</sup> *ibid.* HM Chief Inspector of Prisons, 'Report on an unannounced inspection of Yarl's Wood Immigration Removal Centre' (2013) 16 <<http://www.justiceinspectorates.gov.uk/prisons/wp-content/uploads/sites/4/2014/03/Yarls-Wood-2013.pdf>> accessed 15 November 2015.

<sup>174</sup> APPGR and APPGM (n 158) 53-55.

healthcare in detention. Attitudes to healthcare serve as a disconcerting, but powerful, example of the partiality rooted within the British asylum system against all asylum-seekers, not just LGB claimants.

## ii) Legal Representation

The detention of asylum-seekers has a significant impact upon their access to legal representation. The claimant's restricted movement creates reluctance amongst legal representatives to take on detainees' casework due to the difficulties in preparing the case.<sup>175</sup> Similarly, there is a presumption that 'detained cases' will inevitably fail, which also inhibits the number of willing representatives.<sup>176</sup> Detention impedes the control that an individual has upon their own case, due to their restricted access to computers, fax machines and post, and because many representatives are unable or unwilling to visit detention centres.<sup>177</sup> The ability of the individual to access the evidence required is also unfairly inhibited, due to their poorer contact with support organisations, family members and friends.<sup>178</sup> This is particularly acute in the LGB context, whereby claims are more complex, requiring a significant amount of time for legal representatives to understand and statement them, and where the evidentiary burden is increasingly onerous, as discussed above (section 2).<sup>179</sup>

The empirical data underscored the considerable impact of detention on legal representation. Detained asylum-seekers preferred to remain in detention for several months and wait for a representative experienced in LGB asylum to become available. Many claimants were unwilling to accept the alternative of a representative with no experience in LGB claims, avoiding the potential detriment to their cases:

There are people who are not fast-tracked who could be waiting, for example, three months in detention to see a solicitor experienced in LGB casework (Professional Participant A).

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<sup>175</sup> Interview with Professional Participant A.

<sup>176</sup> Bail for Immigration Detainees (BID), 'Briefing Paper on the Detained Fast-Track' (February 2009) 3.

<sup>177</sup> APPGR and APPGM (n 158) 43.

<sup>178</sup> *JB (Jamaica) v. Secretary of State for the Home Department* [2012] EWHC 1660 (Admin) [29].

<sup>179</sup> *ibid.*



The empirical data underlines the importance of access to quality representation. Detention impedes the ability of LGB claimants to instruct the representatives of their choice, i.e., those with experience and competence in sexual identity-based asylum claims. The consequence is that claimants willingly extend their detention, at great emotional, mental and physical expense. Ensuring their legal representative is appropriately skilled allows them the best chance of obtaining refugee status, given the critical role that representatives play within the process (Chapter two). Consequently, detention constitutes a serious impediment to the rights of LGB asylum-seekers, as it restricts the ability to instruct skilled representation and on-going access for case preparation purposes, engaging the right to fair trial under Article 6 of the EU Charter.

### iii) Punitive Impact

The dehumanising nature of detention is further demonstrated by the UK system's failure to recognise its inherently punitive nature. In the asylum context, it is tantamount to punishing them for claiming asylum. Stevens has critiqued the purpose of detention in the UK asylum system. She argues along similar lines, contending that an analysis of the detention system highlights its use as a 'deterrent, or even as punishment for those seeking asylum in the UK'.<sup>180</sup> Yet, the right to seek asylum is a basic human right.<sup>181</sup>

The punitive intent and impact of the detention system is exemplified by the practice of detaining asylum-seekers in converted prisons or alongside former prisoners. The Prison Service runs the Dover, Haslar and Lindholme centres, where asylum detainees and in-mates are held together and treated interchangeably.<sup>182</sup> This is troubling. In the LGB context, many claimants have experienced incarceration as part of their experiences of persecution, given the number of states that criminalise minority

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<sup>180</sup> Dallal Stevens, 'Asylum-Seekers, Detention and the Law: Morality in Abeyance?' in Satvinder S. Juss (ed), *The Ashgate Companion to Migration Theory and Policy* (Ashgate, 2013) 397.

<sup>181</sup> Universal Declaration of Human Rights (adopted 10 December 1948. UNGA Res 217 A(III) (UDHR) art 14.

<sup>182</sup> The Information Centre About Asylum and Refugees in The UK (ICAR), 'Detention of Asylum Seekers in the UK' Thematic Briefing Prepared for the Independent Asylum Commission Information Centre about Asylum and Refugees (2007) 5.

sexual identities.<sup>183</sup> Thus, for many LGB individuals, detention punishes and re-traumatises them, and subjects them to the same persecutory treatment from which they escaped:

They send me to the toughest detention, like a criminal. I'm not a criminal, you get me? If it is an immigration issue, why should we send somebody to that place? Toughest detention I tell you was Colnbrook (MASY003).

MASY003, a Ghanaian national, was not exaggerating when stating that he was made to feel like a criminal, given that, in his words, he was detained with 'drug dealers and murderers'. Colnbrook is also a former prison used for immigration detention. Detention Action highlighted the methods used there to deprive detainees of their freedom of movement:

People in Colnbrook are locked in their rooms at night, and during the day for roll-calls. There is no freedom of movement around the centre: people are locked on the wing unless they have booked to use the facilities, in which case they are escorted by officers.<sup>184</sup>

A 2010 Report by the Chief Inspector of Prisons also found issues similar to those raised by MASY003 and Detention Action. The Chief Inspector found issues with safety, particularly in relation to significant drug use, and a disproportionate use of force and separation for the purposes of security.<sup>185</sup> This underscores the inappropriate nature of detaining asylum-seekers at such facilities and with former criminals. It exemplifies further that such detention practices potentially violate the fundamental rights of asylum-seekers, particularly their right to liberty and security under Article 5 ECHR and the right not to be subjected to inhuman and degrading treatment under Article 3.

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<sup>183</sup> Spijkerboer and Jansen (n 107) 21.

<sup>184</sup> Detention Action, 'About Colnbrook Detention Centre' <<http://detentionaction.org.uk/aboutus/about-colnbrook-detention-centre>> accessed 9 Sept 2015.

<sup>185</sup> HM Chief Inspector of Prisons, 'Annual Report 2010-11' (2011) 66-71; HM Chief Inspector of Prisons, 'Report on an unannounced full follow-up inspection of Colnbrook Immigration Removal Centre and short-term holding facility' (January 2011) 57 and 63.

This particular argument finds that the British detention procedure is unfair as it denies the fundamental rights of LGB asylum-seekers. The structural principles in Chapter two outline the Home Office's duty to respect and protect the fundamental rights of asylum-seekers, which, in terms of the rights to healthcare and physical and mental safety, have been neglected. In detention, the physical and mental integrity of claimants (alongside their privacy) appears irrelevant. Moreover, detention deprives LGB asylum-seekers of fundamental procedural rights articulated in the structural principles, namely the right to legal representation. This provides a glimpse into the dehumanising nature of the asylum procedure, which is highlighted further with reference to the LGB context in the following section.

### 3.1.3 *Detention Can Be Inherently Inhumane*

There are a number of problems with detention that are specific to the LGB context. Detention can be uniquely experienced by LGB asylum-seekers, rendering it an inherently inhumane procedural tool. This is exemplified by the intolerance faced by LGB asylum-seekers at the hands of detention centre staff and fellow detainees, the discretion that such behaviour forces of them, and the psychological impact of detention. These are explained below.

#### i) Homophobic Behaviour Forces Concealment

The inhumanity of detention in the LGB context relates to the forced concealment of their sexualities. Prior to claiming asylum, many claimants will have been forced to conceal their sexualities in their countries of origin in order to avoid persecution.<sup>186</sup> By being detained in their country of refuge, many must do so again in order to avoid further mistreatment. For LGB claimants, detention with homophobic individuals or those from the same country can be traumatic, fearing the mistreatment that they had escaped.<sup>187</sup>

LGB experiences of detention are not just characterised by fear, however, but actual experiences of social exclusion and verbal and physical harassment.<sup>188</sup> Reports attest

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<sup>186</sup> Spijkerboer and Jansen (n 107) 78.

<sup>187</sup> Nathaniel Miles, 'No Going Back. Lesbian and Gay People and the Asylum System' (*Stonewall*, 2010) 12.

<sup>188</sup> Spijkerboer and Jansen (n 107) 78.

to the abuse within detention centres, not only by fellow detainees, but also staff members and security guards.<sup>189</sup> For example, the all-female detention centre, Yarl's Wood, was exposed for the sexual abuse and mistreatment of detainees.<sup>190</sup> In the light of such reports, it is worrying that in 2014 the UK government denied permission to the UN Special Rapporteur on Violence against Women, Rashida Manjoo, to inspect Yarl's Wood.<sup>191</sup>

The media has also documented the physical and sexual violence towards LGB people within detention centres. For example, several gay men reported being sexually harassed and raped by fellow detainees.<sup>192</sup> The response of detention centre staff raises extreme concerns about the failure to treat such behaviour with the seriousness required. In these cases, staff advised victims to adopt 'discreet' gender presentations and discouraged them from reporting the assault, warning that it would delay their asylum claim.<sup>193</sup>

The UKLGIG's research into LGB experiences of detention mirror these issues. For example, a claimant shared a room with a detainee who threatened physical and sexual violence:

I was threatened by a cell-mate. After calling me all manner of derogatory remarks, in his words, 'I will rape and fuck you to death and make sure I kill

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<sup>189</sup> *ibid.*

<sup>190</sup> Mark Townsend, 'Serco, the Observer, and a Hunt for the Truth About Yarl's Wood Asylum Centre') *The Guardian* (17 May 2014) <<http://www.theguardian.com/uk-news/2014/may/17/serco-yarls-wood-asylum-centre>> accessed 9 Sept 2015.

<sup>191</sup> Office of the High Commissioner for Human Rights (OHCHR), 'Special Rapporteur on Violence against Women Finalizes Country Mission to the United Kingdom and Northern Ireland and Calls for Urgent Action to Address the Accountability Deficit and Also the Adverse Impacts of Changes in Funding and Services' (15 April 2014) 6-7 <<http://www.ohchr.org/en/newsevents/pages/displaynews.aspx?newsid=14514&>> accessed 9 Sept 2015.

<sup>192</sup> Patrick Strudwick, 'This Is What Happens in Detention Centres If You're Lesbian or Gay' *BuzzFeed* (23 June 2015) <<http://www.buzzfeed.com/patrickstrudwick/this-is-what-happens-to-lesbian-and-gay-asylum-seekers-in-de#.oi62VnNWB>> accessed 9 Sept 2015.

<sup>193</sup> *ibid.*

you if they ever allow you stay a night in my cell'. It all happened in front of a prison official.<sup>194</sup>

Within the empirical data, participants also recounted their experiences of intolerance, aggression and abuse faced on the basis of their sexual identities:

My roommate, she was always very aggressive towards me, and one day, she actually shouted at me, 'You're going to die, you're fat, you're ugly, you're this, you're that, you can't be like that'. I complained about it, but all [that] was done was changing her to another room. I used to trust this person every day. Just imagine how frightened I was. And I was scared to go with other girls in the centre. And every night I would sleep very worried about my safety (FASY007).

FASY007 thus articulates the impact that the homophobic abuse in detention had on her emotional well-being and fear for her physical security.

An asylum-seeker participant of the empirical research clarified that it is the fear of such mistreatment that results in the concealment of their sexualities in detention:

I [had] been very careful and reserved. I didn't show anyone [my sexuality]. I thought if someone ask[ed] me, 'Why are you here?' I said, 'It is some political battle in my country'. I didn't explore myself, why I'm here, so this hides it (MASY002).

Enforced discretion has been identified as persecutory conduct in *HJ (Iran)*, as discussed in Chapter three. The Home Office can accept that enforced discretion is persecutory in a claimant's country of origin, but remains insensitive to the physical and psychological impact of enforced discretion resulting from its detention policy. The continued detention of LGB asylum-seekers demonstrates the contradictory and

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<sup>194</sup> *ibid.* The UKLGIG has also documented the LGB experience of detention in its submission to the Parliament. See, UKLGIG, 'Written Submission to the Parliamentary Inquiry into the Use of Immigration Detention in the UK, Hosted by the APPG on Refugees and the APPG on Migration' (September 2014).

fractured nature of asylum decision-making, the segmented understanding of sexual identity, and a disregard for LGB claimant's fundamental rights.

Importantly, the empirical data does highlight the sensitivity of some detention centre staff by connecting sexual minorities together for mutual support:

The support worker from the UKLGIG said to me, 'Go and see your detention centre manager, tell him your situation and he might help you.' And then I speak [spoke] to him, and he was really good. He introduced me to other gay guys from Venezuela and they were in the same unit as me. And so we made friends and I used to spend loads of time with them in the detention centre (MASY006).

Thus, amongst certain detention centre staff, there appears to be some sensitivity to the plight of LGB detainees. It also exemplifies, however, the enduring inconsistency in the quality of the asylum system experienced by sexual minorities. The enduring impact of concealment and prolonged detention is described in the following sub-section.

## ii) Psychological Harm

The insufficient attention given to psychological harm is also a fundamental matter. The impact of detention on a detainee is unsatisfactorily researched, given the prominence of trauma, torture and poor mental health amongst asylum-seekers that this thesis has described. In the Canadian context, Cleveland and Rousseau compared the mental health of detained and non-detained asylum-seekers.<sup>195</sup> Their research found a strong correlation between detention and increased levels of poor mental health, such as PTSD, depression and anxiety.<sup>196</sup> For those who had experienced trauma prior to seeking refuge, detention exacerbated psychiatric problems. Where the experiences of pre-migration trauma were insignificant, detention still led to high incidences of trauma and poor mental health.<sup>197</sup> Consequently, Cleveland and

<sup>195</sup> Janet Cleveland and Cécile Rousseau, 'Psychiatric Symptoms Associated with Brief Detention of Adult Asylum Seekers in Canada' (2013) 58(7) *Canadian Journal of Psychiatry* 409-16.

<sup>196</sup> *ibid* 412.

<sup>197</sup> *ibid* 410.

Rousseau concluded that detention is a severe aggressor in destabilising the mental health of the already vulnerable category of asylum-seekers.<sup>198</sup>

The empirical data identified that detaining LGB asylum-seekers had a destructive impact upon their mental well-being. MASY003 explained that he attempted suicide whilst detained:

People always hurt themselves. They tried to commit suicide, even me. I know my country, how they do, I've seen how they kill people. I was young, but I saw it, I know how they do things. I will not go through that. I told them: 'instead of that, let me die here'. Then you can carry my dead body home (MASY003).

The impact of detention upon the mental health of LGB asylum-seekers is especially important. This thesis has found a significant incidence of trauma and mental illness amongst the participants of the empirical research. For both LGB asylum-seekers who have suffered prior torture, trauma and/or poor mental health, and for those who have not, detention has a destructive impact upon their psychological well-being. This engages their fundamental dignity and integrity, and their right to avoid being subjected to inhuman and degrading treatment, as secured by Articles 3 and 8 ECHR.

The UK's detention practice with respect to LGB asylum-seekers is unfair because it is inconsistent with the structural principles of Chapter two. First, it fails the duty to have respect for the fundamental rights of LGB asylum-seekers. This is evidenced by the poor screening procedures resulting in the detention of victims of trauma and ill-health (and barriers placed against securing their release), poor standards of healthcare, the punitive impact of detention, experiences of intolerance and violence, and the psychologically debilitating impact of detention. The contradiction between, on the one hand, treating enforced discretion in a claimant's country of origin as persecutory and, on the other hand, accepting enforced discretion within detention, reflects quite clearly the British system's poor understanding of sexual identity and its engagement with fundamental rights. Secondly, the Home Office's practice fails to

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<sup>198</sup> *ibid* 414.

adhere to the law and guidance with regard to determining a claimant's suitability for detention and the implementation of safeguards to ensure detention is reviewed regularly and can be challenged. Thirdly, detention restricts a detained asylum claimant from instructing and accessing legal representation, especially a representative competent in sexual identity-based asylum claims. This is to the claimant's personal detriment, leading to claimants choosing to remain in detention until a preferred representative becomes available. Finally, the Home Office fails to implement the detention of LGB claimants free of bias. The 'culture of disbelief' is reflected in the unwillingness to afford medical reports their appropriate weight at the screening and review stage, or take the healthcare needs and psychological impact of detention seriously. For LGB claimants, the 'culture of disbelief' is also present within their detention through the large numbers and the ongoing ignorance to their abuse and enforced discretion. The weight and breadth of these criticisms is damaging, and should signify that the UK detention practice requires a substantial overhaul.

### **3.2 Accelerated Procedures: Detained Fast-Track**

Amongst the issues regarding the detention of LGB asylum-seekers, the use of accelerated procedures of determination has been the most contentious. Due to this contentious nature and the specific impact on LGB claimants, accelerated procedures warrant further analysis. Within the British asylum system, the procedure is known as the Detained Fast-Track system ('DFT'). DFT is the Home Office's case management system to process asylum claims under accelerated procedures, whilst the claimant remains under administrative detention at Yarl's Wood or Harmondsworth detention centres.<sup>199</sup> DFT aims to process an asylum claim within two weeks.<sup>200</sup> Under DFT policy, a claimant is subjected to the track where there is a 'power to detain' and where, based on the facts obtained at the screening interview, officials believe a quick decision can be made.<sup>201</sup> DFT was pioneered as an important

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<sup>199</sup> Immigration Law Practitioners' Association (ILPA), 'The Detained Fast-Track Process: A Best Practice Guide' (2008) 10.

<sup>200</sup> Home Office, 'Asylum Policy Instruction: Detained Fast-Track Processes - Timetable Flexibility' (11 January 2012) s.2.1.

<sup>201</sup> 'API: Detained Fast-Track Processes' (n 150) s.2.



component of the Home Office's 'New Asylum Model'.<sup>202</sup> This was introduced in 2007 to address the Home Office's increasing backlog of outstanding claims.

The UNHCR has mandated that a detention policy (e.g. DFT) must be 'necessary, reasonable and proportionate'.<sup>203</sup> Each case must be assessed on its merits. The DFT process in the UK, however, has been criticised for being unfair.<sup>204</sup> This has resulted in several legal challenges on this basis. In *Saadi v. UK*, the ECtHR rejected the challenge, arguing that the short-term detention of foreigners who were not at risk of absconding did not violate their fundamental rights.<sup>205</sup> The action of the British government was deemed proportionate to the aim of controlling their borders.

More recently, in *Detention Action v. SSHD*, Detention Action sought judicial review of the fairness and legality of DFT before the domestic courts.<sup>206</sup> Detention Action argued that the implementation of the system had changed so significantly since its introduction that the earlier judgments of *Saadi* and *R (Refugee Legal Centre) v. SSHD*<sup>207</sup> were no longer applicable. Detention Action contended that DFT was so unfair that it was unlawful, both in common law and under Article 5(1)(f) ECHR. The High Court agreed, ruling in favour of Detention Action, with Ouseley J finding that 'the DFT as operated carries an unacceptably high risk of unfairness'.<sup>208</sup> Ouseley J agreed that there were serious failings with the system, but did not believe these led to the system being inherently unlawful. Instead, the main factor of DFT's unfairness was that lawyers, who had existed as the 'crucial safeguard' against the system's injustice, were no longer able to do so.<sup>209</sup> Lawyers were instructed far too late into the asylum process, often a day or so before the substantive interview. This meant

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<sup>202</sup> ICAR (n 182) 10.

<sup>203</sup> UNHCR, 'Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012) 21.

<sup>204</sup> Detention Action, "'Fast Track to Despair': The Unnecessary Detention of Asylum Seekers' (May 2011).

<sup>205</sup> *Saadi v. United Kingdom* App no. 13229/03 [2008].

<sup>206</sup> *R (Detention Action) v. Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) [1].

<sup>207</sup> *R (Refugee Legal Centre) v. SSHD* [2004] EWCA Civ 1481.

<sup>208</sup> *R (Detention Action) v. SSHD* [2014] (n 206) [197].

<sup>209</sup> *ibid* [195].

that they could not undertake the necessary preparation to tackle the prejudicial position under which fast-tracked claimants were placed. To overcome this aspect of unfairness, the Secretary of State changed the DFT procedure. The Home Office now allowed 4 days between the allocation of a legal representative and the substantive interview, which Ouseley J found to sufficiently address the issue.<sup>210</sup> Therefore, Detention Action's challenge and subsequent appeal were rejected.<sup>211</sup>

In 2015, the legality of the DFT procedure was scrutinised once again in the case of *Lord Chancellor v. Detention Action*, where Detention Action challenged the Fast Track Rules.<sup>212</sup> The Rules addressed the procedure for appeals to the First-Tier Tribunal against the Home Office's rejection of an initial asylum claim. The High Court held that the Rules were *ultra vires* section 22 of the Tribunals, Courts and Enforcement Act 2007, because they were 'structurally unfair and put appellants seeking to challenge asylum decisions of the SSHD [Secretary of State for the Home Department] at a serious procedural disadvantage'.<sup>213</sup> The Lord Chancellor appealed this decision to the Court of Appeal, citing that there were five safeguards in place to overcome 'any systematic unfairness that would otherwise result from the tight time limits'.<sup>214</sup> These safeguards included the use of independent and impartial judges to preside over the appeals.<sup>215</sup> Judges, as experts in the evidential, legal and procedural issues arising in asylum claims, would act as sufficient guardians of justice and fairness. Under the Fast Track Rules, if judges deemed it necessary to the fair consideration of a particular case, they had the power to take a claimant out of the DFT process.<sup>216</sup>

The Court of Appeal rejected Lord Chancellor's argument. The court accepted that immigration judges were able to address matters of fairness. It believed the timetable for these appeals was so short, however, it was reasonably conceivable that many

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<sup>210</sup> *Detention Action v. Secretary of State for the Home Department* [2015] EWHC 1689 [1].

<sup>211</sup> *ibid.*

<sup>212</sup> *Lord Chancellor v. Secretary of State for the Home Department* [2015] EWCA Civ 840.

<sup>213</sup> *ibid* [31].

<sup>214</sup> *ibid.*

<sup>215</sup> *ibid* [31-34].

<sup>216</sup> *ibid* [34].

appellants could not present their cases properly.<sup>217</sup> Given the absence of Case Management Review Hearings from the DFT structure, it was also difficult for appellants to have their cases taken out of DFT unless the judges were persuaded to do so.<sup>218</sup> Yet, this opportunity could only arise at the appeal hearing itself. If the judge refused permission, the appellant's representative would still need to be ready to present the appeal. Although the Court of Appeal felt that the DFT initiative was a 'laudable' way of processing claims efficiently, the potential consequences of mistakes within the process were extremely severe. Thus, 'fairness could not be sacrificed on the altar of speed and efficiency'.<sup>219</sup> This decision has since led to the temporary suspension of the DFT procedure by the Home Office until they are able to ensure that the process will comply with the duties of fairness and justice.<sup>220</sup>

Exploring DFT further is valuable for this investigation due to the disproportionate number of LGB asylum claims selected to enter the DFT process (until it was suspended in 2015).<sup>221</sup> Within the empirical data, 7 out of the 20 asylum-seekers interviewed had been subjected to the DFT procedure.<sup>222</sup> This appears to be significant within the sample taken by the empirical data, although there are no publicly available statistics on the number of fast-tracked LGB cases.

The views on DFT amongst asylum-seeker participants were mixed. Two participants spoke of the procedure in favourable terms, valuing the speed and efficiency that motivated its implementation. Notably, they also had the privilege of preparing their cases thoroughly before claiming asylum:

I like the fast-track system because it is faster, you can get a quicker result. It can be good or bad, but at least you know what is happening, what is going to be your future. It is quite clear. Everything is clear in front of you, it's quite

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<sup>217</sup> *ibid* [38].

<sup>218</sup> *ibid* [40-43].

<sup>219</sup> *ibid* [49].

<sup>220</sup> House of Commons: Written Statement (HCWS83). [Home Office, Written Statement made by: The Minister of State for Immigration (James Brokenshire) on 02 July 2015].

<sup>221</sup> UKLGIG, 'Missing the Mark' (n 24) 28.

<sup>222</sup> FASY004; FASY007; MASY002; MASY003; MASY006; MASY008; and MASY009. Five of the seven asylum-seekers are male.

good. The other way, I don't know what it is called, but it is quite a lengthy process, it kills lots of time, so fast-track is much better than that (MASY009).

Nonetheless, there are a number of issues with the implementation of the DFT procedure in LGB claims raised by the standard of fairness applied in this thesis. The first and greatest problem with DFT is the selection process to determine which claim will enter this track. Like detention generally, suitability for DFT is determined at the screening interview. This is despite, as established above, the inadequacy of the standard questions posed within the screening interview. The questions simply do not address issues that would enable a screening officer to make an informed decision on a claimant's suitability for DFT. As the sub-section on detention suggests above, screening officers lack the necessary training and experience to make decisions about suitability. Furthermore, the appropriate questions are simply not raised within the interview. The UNHCR and other NGOs criticised the inappropriateness of screening interviews for determining a claimant's suitability for DFT.<sup>223</sup> Ouseley J also criticised the screening interview in *Detention Act v. SSHD*. He stated that when assessing a claim's suitability for DFT, 'the effect on the fair presentation of the claim which the timetable and the fact of detention may have for that applicant' must be considered.<sup>224</sup> The screening interview is simply not constructed, in terms of the interviewer's skills and experience and of the questions posed, to facilitate such complex considerations.

Within LGB claims, the UKLGIG also noted the inadequacy of the process for determining a claimant's suitability for DFT. Decision-makers regularly used arbitrary considerations in their communications to justify selection for DFT.<sup>225</sup> These 'cut and paste' decisions reproduced paragraphs of DFT policy guidance without applying them to the circumstances of the claimants concerned. As LGB claimants do not reveal details of their claims at the screening interview beyond their sexuality, it is difficult to understand the basis on which they are chosen for DFT. If

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<sup>223</sup> UNHCR, 'Quality Integration Project: Key Observations and Recommendations', UNHCR Representation to the United Kingdom in London (August 2010) <[http://www.unhcr.org.uk/fileadmin/user\\_upload/pdf/First\\_Quality\\_Integration\\_Project\\_Report\\_Key\\_Findings\\_and\\_Rec\\_01.pdf](http://www.unhcr.org.uk/fileadmin/user_upload/pdf/First_Quality_Integration_Project_Report_Key_Findings_and_Rec_01.pdf)> accessed 9 Sept 2015.

<sup>224</sup> *R (Detention Action) v. SSHD* [2014] (n 206) [106-112].

<sup>225</sup> UKLGIG, 'Missing the Mark' (n 24) 28.

this is based on a mistaken assumption that such claims are straightforward and facilitate quick decision-making, the discussion on the production of evidence, particularly narrative evidence in section 2 above, highlights that this is not the case. In particular, O’Leary’s comments in the empirical data on investing 20-25 hours to produce a statement are instructive. Rarely can LGB claims be conducted under accelerated procedures. Thus, returning to the structural principles, the process is procedurally unfair because the decision-makers lack the necessary training and skills to conduct such claims, demonstrated especially by the arbitrary nature of the reasons communicated for justifying the decision.

The Court of Appeal also addressed the defectiveness of the screening interview for determining DFT suitability. On the subject of an LGB claim in the case of *JB (Jamaica) v. SSHD*, the court found that the screening interview failed to:

[D]irect the interviewing officer’s attention to the need to investigate the nature and circumstances of the claim in a way that would enable an informed assessment to be made of the likelihood of being able to make a fair and sustainable decision in about two weeks.<sup>226</sup>

The Court of Appeal criticised the Home Office for believing that it could quickly determine the appellant’s case under DFT.<sup>227</sup> The appellant’s sexuality could not have been established without recourse to external evidence, which would take some time to procure. The difficulty of ascertaining the truth of an individual’s sexuality meant that ‘no reasonable person in possession of all the information about the appellant that could and should have been available’ would believe that a fair and sustainable decision could be reached in two weeks.<sup>228</sup> As a result, the failure to allow the appellant the time needed for his asylum claim meant the decision to place his case under DFT was unfair and unsustainable.<sup>229</sup> As stated throughout this thesis, LGB claims are complex, relying on sexual minorities ‘proving’ the genuine nature of

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<sup>226</sup> *JB (Jamaica)* (n 178) [28].

<sup>227</sup> *ibid* [30].

<sup>228</sup> *ibid* [30].

<sup>229</sup> *ibid* [29].

their sexualities. For decision-makers, objectively verifying the risk of persecution is difficult due to the evidentiary challenges of objective information (Chapter three). The production of subjective evidence, as discussed earlier in this sub-section and under section 2, involves other challenges. As a result, subjecting LGB claims to DFT, without substantiated knowledge that they will be resolved quickly, is procedurally unfair.

An associated problem with using the screening process for suitability assessments is that the DFT process contains insufficient safeguards to prevent especially vulnerable asylum-seekers from being fast-tracked. The DFT policy states that victims of torture and those with a ‘mental medical condition which cannot be adequately treated within a detained environment’ should not be subjected to DFT.<sup>230</sup> In practice, this is not always the case. The poor safeguards for vulnerable claimants also formed the subject of *Detention Action*’s legal challenge of DFT. Ouseley J argued that the suitability of detaining victims with mental illnesses was too broad a question for the legal challenge presented before him.<sup>231</sup> Nonetheless, he acknowledged that the screening process and Rules 34 and 35 of the Detention Centre Rules 2001 were inadequate safeguards against the fast-tracking of vulnerable people.<sup>232</sup> He stopped short of calling the DFT policy unlawful, but warned that, if left unaddressed, these issues could result in a higher risk of unfair decision-making.

The findings within the empirical data support these criticisms of DFT. Both FASY007 and MASY006, whose experiences were outlined in the previous section on detention, were subjected to the DFT procedure on the basis of their screening interviews. This was despite the fact that FASY007, a Ugandan lesbian, had a partner and daughter outside (family life appears to be a consideration only in detention policy, not DFT policy) and was a victim of torture. MASY006, a Pakistani gay man, was also a victim of torture and had attended the screening with a letter from his representative explaining that it was inappropriate to detain or process his claim under DFT. Both claims were eventually taken out of DFT. The Medical Foundation

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<sup>230</sup> API: ‘Detained Fast Track Processes’ (n 150) s.2.3.

<sup>231</sup> *Detention Action v. SSHD* [2014] (n 206) [154].

<sup>232</sup> *ibid* [155-157].

documented their experiences of torture. This would not have been possible if they remained under DFT, as the process of producing such reports exceeds the two-week timeframe of concluding an asylum claim. These cases serve as an example that, too often, the DFT procedure has been implemented inappropriately. Decisions are based on insufficient and erroneous assessments of the suitability of LGB asylum-seekers for detention, and their potential for a quick resolution. In these claims, it is not just poor training that is the issue, but the ‘culture of disbelief’, which enables officers to ignore a claimant’s particular circumstances even when signposted.

FASY007, a victim of torture, described the unfair impact of DFT on her claim. Under the procedure, her case was refused and she was prepared for deportation in a matter of weeks. This is despite her unsuitability for DFT and subsisting relationship that supported her claim of being a genuine sexual minority:

I was put up into the detained fast-track and in this, the final weeks, within 10 days or 3 weeks, my case was finished and I was given a plane ticket for a deportation order, as they call it now. [Detained] fast-track is just the worst experience, it’s the most unfair experience one can ever have in this justice system (FASY007).

MASY008 described the impact of both detention and accelerated procedures upon his mental and physical well-being. In doing so, he also demonstrated his unsuitability for DFT:

When I was in detention, to be honest with you, I kind of programmed [myself] into survival mode because I knew what was happening... But yeah, I suffer from stress disorder, where I would literally blackout. That happened in detention and I fainted and I hit my head and stuff, and they had to rush me to hospital. You can imagine. And while they were rushing me to hospital, they handcuffed me and everything (MASY008).

The second area of criticism with regard to DFT concerns the preparation of one’s case and access to competent legal representation. In the second half of 2012 alone, one firm of legal representatives estimated that 60% of claimants under DFT at

Harmondsworth were placed in detention for a minimum of a week without access to legal advice.<sup>233</sup> In 2012, 59% of claimants at Harmondsworth had no legal representation at their first-instance appeals. Of these, only 1% of claimants were successful in their appeals, compared to 20% of claimants under DFT with legal representatives.<sup>234</sup> DFT exemplifies the refusal culture most acutely, given that in 2005, for example, 99% of fast-tracked claims at Harmondsworth were refused, with only 6% of appeals lodged being successful.<sup>235</sup> Similarly, at Yarl's Wood, 99% of claims were also refused, where only 3% of lodged appeals were eventually successful.

Access to quality legal representation under DFT is thus a significant issue of concern, particularly given that detention inhibits access to one's representative and truncates the time available to prepare the case. Erin Power explained the increasing corporatisation of legal representation. Only firms 'authorised' to represent claimants under DFT could do so, resulting in claimants losing their representatives. Where alternatives were found, these representatives often lacked the experience needed for LGB claims:

Legal rights in detention are worse than a lottery. One firm has got the contract full stop, so you're only going to see someone from that firm. And then there's one firm that has a lot of good detention contracts who are not very good at all. And then Wilson [Solicitors] has [have] a detention contract and they are brilliant (Erin Power).

DFT acts as an impediment to accessing competent legal representation, and the ability for claimants and legal representatives to present the case to the best of their ability. Once MASY006 and MASY008 were subject to DFT, they lost their legal representatives, who did not have the funding or authority to represent them in their claims any further. MASY008 was lucky in that his representatives referred his claim to a firm with the ability to represent him:

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<sup>233</sup> Detention Action, "'Fast Track to Despair'" (n 204) 4.

<sup>234</sup> *ibid*; ICAR (n 182) 7.

<sup>235</sup> *ibid* ICAR.



Paragon did not have that authority, so they had no choice but to cut me off. But they didn't cut me off, they put my case down to a couple of firms who had the authority and I just talked to them (MASY008).

By contrast, MASY006 was left in a position of insecurity until he was allocated a representative by the Home Office, a representative with a reputation for poor quality work in LGB asylum claims:

When I got detained, my solicitor said, 'We can't help you when you are in detention. We don't have enough funding to support you' (MASY006).

As the structural principles contend, it is not enough for LGB claimants to have access to legal representation. The representation must also be of a high quality; the representatives must be skilled and experienced in sexual identity-based asylum claims. Under DFT, the adequacy of access to quality legal representation is sacrificed because speed and efficiency are considered greater priorities. Access to poor representation is still unfair, due to the prejudicial impact that it can have upon the presentation of those claims, especially in the LGB context. Furthermore, it creates inconsistency and prejudice within the experiences of LGB asylum-seekers, between those able to choose their representatives on the basis of their prior experience, and those that are deprived of this opportunity. This is unacceptable; speed and efficiency should not supersede access to competent legal representation.

Practitioners also highlighted the detrimental impact of DFT on the ability for legal representatives to adequately prepare and present LGB claims:

I think the DFT system is a real problem. I think it can be really quite destructive, and when they're in there – we wouldn't let anybody go near the Home Office until we've actually prepared the whole case completely – but when they're in there, it's very, very difficult then to do a statement or get evidence, and because it goes so quickly, I think the detention process could end up with them not really giving a good account of themselves (Barry O'Leary).

The challenges faced by legal representatives are critical. In *Lord Chancellor v. Detention Action*, the Court relied on the witness statements of several legal representatives to understand the stresses placed upon them. Witnesses described the difficulty of completing all of their tasks in connection with an appeal in the condensed timeframe.<sup>236</sup> Timing was also an issue for counsel; they were rarely given more than 45 minutes for a conference with their clients, which was insufficient.<sup>237</sup> The empirical data also raised similar issues regarding the burden placed upon legal representatives under DFT. The consequence is that the truncated timeframes and associated pressures injured the ability of competent representatives to provide adequate standards of service. Additionally, representatives without the necessary skills would also provide a poorer quality of service because of the high number of DFT cases and the speed required by the process:

But there are also people under extreme pressure working in firms in London – firms that had contracts to service the DFT. There are not enough of them, they've got too many cases. So it's just – and there's only so many hours in the day and I think since the start of 2013, somebody at the Tribunal told me that the intake into the DFT is up 100%, so there's a lot of pressure from the Home Office going into that, so they can say, 'we're processing things really quickly'. But there's obviously a fallout from that in terms of [the pressure] on the representatives that are trying to service those contracts – to do that work really – representation is really variable, because there is also the luck of the draw (Catherine Robinson).

The operation of the DFT procedure in LGB claims is unfair due to its non-compliance with the structural principles. First, the decision to place someone within DFT relies on the screening process, which is not fit for purpose. Personnel without the appropriate guidance, skills or infrastructure to make such a significant decision are tasked with doing so. This engages the principles that concern guidance and the training and skills of decision-makers. Secondly, the impact of this is the breach of

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<sup>236</sup> *Lord Chancellor v. Secretary of State for the Home Department* (n 212) [20].

<sup>237</sup> *ibid* [21].

LGB claimants' fundamental rights. The subjection to DFT of victims of trauma and torture, and the experiences of some of the asylum-seeker participants of the empirical research, demonstrate the inadequacy of the screening process, as does the number of claims removed from the process. Thirdly, DFT is detrimental to LGB claimants' ability to present their claims properly, and their ability to access competent legal representation. The procedure places an extraordinary pressure upon legal representatives to work within narrow confines and timeframes, which in many cases affects the proficiency of their work. Additionally, the DFT 'contract system' for legal representatives often provides LGB claimants with access to lawyers of more limited experience and ability, when knowledge of the nuances in LGB asylum claims is essential to successful representation. Finally, the fact that a disproportionate number of LGB claims appear to be fast-tracked raises questions about the partiality of the overall system, and the impact of the 'culture of disbelief' on deciding a claimant's appropriateness for DFT.

It is understandable that many asylum-seekers will value the speed that the DFT provides, especially in contrast to the delays often involved in the ordinary determination process. Yet, as stated by the Court of Appeal, although speed and efficiency are important, they cannot sacrifice 'fairness and justice'. The British asylum system must seek to address these procedural challenges. Although, it is commendable that the Home Office has suspended the DFT procedure in recognition of its procedural unfairness, it remains unclear how this unfairness will be overturned if/when DFT is reintroduced or replaced.

The next section considers the role of personnel in affecting the experience of the British asylum system, particularly LGB claimants.

#### 4. Personnel: Recruitment, Training and Conduct

No asylum system exists without its operation by personnel acting on behalf of the authority responsible for processing refugee claims. Throughout the asylum procedure, claimants are exposed to personnel at all stages: screening interview,

substantive interview, detention, appeal, etc. Through this investigation of the British asylum system for LGB claimants, the skills and conduct of Home Office personnel and tribunal judges have been central issues under scrutiny. Accordingly, this section ties together the concerns raised thus far about the personnel operating the UK system. The claimant-personnel interaction warrants a separate investigation due to the aforementioned need for cooperation between both parties for the procedure to operate smoothly.<sup>238</sup> This section first assesses the conduct of personnel when dealing with sexual identity-based asylum claims. Subsequently, it explores the Home Office's recruitment and training of its personnel.

#### **4.1 The Conduct of Personnel within the British Asylum System**

The conduct of personnel operating the British asylum system is critical to its fairness. It impacts the experiences of the claimants, in terms of their willingness to cooperate within the process and make the full disclosures required to determine their asylum claims properly.<sup>239</sup> Sensitivity is especially important where claimants have suffered trauma or torture. It is needed in the cases of LGB asylum-seekers, who have left societies intolerant of their sexual identities and will be sensitive to similar prejudices, also having, in some instances, internalised such ill-feeling.<sup>240</sup> The Home Office's guidance reminds decision-makers to conduct a 'sensitive enquiry', ensuring 'an open and reassuring environment'.<sup>241</sup> This, it asserts, will 'help to establish trust between the interviewer and claimant' and facilitate the 'full disclosure of sensitive and personal information'.<sup>242</sup>

The UKLGIG explained the insensitivity of the screening interview to the needs of sexual minority claimants.<sup>243</sup> LGB people were expected to reveal their sexualities to the screening officer in a semi-public setting, allowing waiting claimants to eavesdrop. Those attending with family members were forced to disclose their

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<sup>238</sup> 'API: Considering Asylum Claims and Assessing Credibility' (n 14) 9.

<sup>239</sup> Berg and Millbank (n 118) 199-200.

<sup>240</sup> *ibid.*

<sup>241</sup> 'API: Sexual Orientation Issues' (n 13) 10.

<sup>242</sup> *ibid.*

<sup>243</sup> UKLGIG, 'Missing the Mark' (n 24) 12.

sexualities in front of them, even if they have not yet come out to their families.<sup>244</sup> Once again, the right to privacy of LGB asylum-seekers is overlooked; this is a repeated theme of this chapter's investigation into procedural matters. Yet, should an individual neglect to mention the basis of their claim, i.e., their sexuality, this is used against them, as a means of doubting their credibility. Again, decision-makers use spurious issues to deny the validity of a claimant's sexuality, ignoring issues of sensitivity, security and confidentiality:

It is not accepted that you were not given enough time to mention the problems you have suffered due to your sexuality. Your failure to mention this at your screening interview leads to this aspect of your claim having no credence attached to it. It is also considered that you had a further 5 days between your asylum claim and substantive interview, where you had the opportunity to submit any further additional information that you may have forgotten to submit in your screening interview. In light of these points, it is therefore not accepted that you are a genuine homosexual and fear return to the Gambia as you claim.<sup>245</sup>

Within the empirical data, the experiences of the asylum interviews were variable. Some participants described the warm, sensitive and open environments that decision-makers created for them, particularly within the substantive interview setting. Such conduct facilitated the process of disclosure:

She was such an amazing lady. She was very nice. We just went inside, she behaved with me really well... She was asking about my rings, I was wearing so many! And she was admiring them and she was looking at my photographs and asking, 'who are these people?' I just told her that these are my friends, and then she asked me about my life, and she was very cooperative with me (MASY007).

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<sup>244</sup> *ibid.*

<sup>245</sup> *ibid.*, citing the Reasons for Refusal letter of a Gambian applicant from January 2011.

Yet, many interviewees had negative experiences of the conduct of the personnel operating the British asylum system, especially at the screening interview. Claimants were subjected to aggression stemming from the overriding culture of disbelief and the conception of asylum-seekers as economic drains:

The screening interview was okay from the beginning, but at the end, there was a little bit of discomfort between me and the lady who interviewed me because after the interview, before I signed the interview record, she started making bad comments. She said, 'I don't believe you are gay. You guys sit down here, they give you free food, [a] free bed to sleep [in], they look after you. If they want you to go back to your country, you don't want to go' (MASY003).

Participants also experienced insensitivity or outright homophobia, and these must have impacted upon their feelings of security in those environments and their willingness to disclose aspects of their claim:

And while I was there, she asked me why am I claiming asylum and I told her. She said 'okay'. When she asked me where I was from and I told her, she called one of her colleagues and started laughing, telling her colleague, this guy's gay from Jamaica and he's claiming asylum, and both of them start[ed] laughing (MASY008).

Furthermore, FASY002 was so unhappy with her screening interviewer's insensitivity, she was confident enough to assert her desire to be interviewed by someone else:

This man was calling out my number to all, like he say 'number 35 for the lesbian case'. I was like, 'I'm not moving' and I sat there and I wait, wait. And I said, 'I'm not getting up'. And I went to a lady and said, 'can I get someone else to interview me because he's just talking my business and I'm not really going to sit there and talk to him' (FASY002).

The vast majority of the participants did not describe the impact of insensitivity, homophobia or other prejudice upon their negotiation of the asylum system. One interviewee, however, asserted that the verbal aggression at the screening and substantive interviews (also encompassing the aggressive interviewing style) left her feeling intimidated and afraid. This must have influenced her ability to cooperate with the asylum system:

Through their conversation, they are provoking me and goading me, I was naïve and afraid, I was answering each of their questions (FASY003).

In the empirical data, practitioners attempted to identify the cause of such poor conduct at the screening stage:

Screening officers are not trained at all. Well, they may be trained in screening, but they are not trained in LGB issues (Erin Power).

Although the Home Office trains its decision-makers, and training on LGB issues has been available for immigration judges, screening officers do not have access to such training. This does not necessarily explain the aggression and disbelief of screening officers, which speaks directly to the ‘culture of disbelief’ operating within the British asylum system. Expressions of stereotypes by staff members that asylum-seekers are ‘bogus’ or ‘inauthentic’ surely reflect the entrenchment of disbelief regarding the narratives of persecution presented by claimants. Such disbelief attests to the inherent partiality within the asylum system.

At the substantive interview stage, there are also issues with the conduct of decision-makers. The instructions on sexual orientation emphasise the use of open questions, for claimants to describe the development of their identity.<sup>246</sup> The training provides meaningful guidance on forming open questions to empower claimants to present their lives and experiences as they wish to do:

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<sup>246</sup> ‘API: Sexual Orientation Issues’ (n 13) 10.

Asking how many times you have had sex with someone is not a particularly good question. It is better to look at how they met, how they were able to reveal their feeling to each other and other surrounding issues.<sup>247</sup>

The training deserves praise for its workshop and discussion-led approach to the issue of questioning, including its emphasis on the claimant's identity and expression, in line with sexual diversity.<sup>248</sup>

Despite the exemplary nature of the training and the availability of good guidance, the UKLGIG highlighted problems with questioning within the substantive interview setting. When questioning LGB asylum-seekers, interviewers' questioning was overtly sexualised, veering into the obscene. Interviewers consistently posed insensitive, sexualised questions about the sexual preferences of claimants, despite the fact that minority sexual identities cannot be reduced to their sexual practices, as underscored throughout this thesis. Interviewers repeatedly conflated sexual practice and sexual identities as one. Even sexual identity turned on one major issue – the claimant's romantic and sexual relationships. For example, claimants were asked the following questions: 'Was it loving sex or rough?', 'So you had intercourse with him and not just blow jobs?', 'Can I ask why you did not have penetrative sex at any time in Nigeria up until December 2009?'.<sup>249</sup> Interviewers also continue to pass judgement about claimants' sexual choices, questioning their non-monogamy.<sup>250</sup>

The 'Free Movement' blog also gained access to the questions posed to a detained bisexual claimant during his substantive interview.<sup>251</sup> Their obscenity demonstrates that inappropriate questioning persists in sexual identity-based asylum claims, despite advocacy and training.<sup>252</sup> Questions posed by the interviewer included: 'Did you put

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<sup>247</sup> 'FOI 27021' (106) 25.

<sup>248</sup> Jenni Millbank, 'The Right of Lesbians and Gay Men to Live Freely, Openly and on Equal Terms Is Not Bad Law: A Reply to Hathaway and Pobjoy' (2012) 44(2) *New York University Journal of International Law and Politics* 497-527, 513.

<sup>249</sup> UKLGIG 'Missing the Mark' (n 24) 20.

<sup>250</sup> *ibid.*

<sup>251</sup> Colin Yeo, 'Questions to a Bisexual Asylum Seeker in Detention' (*Free Movement*, 24 January 2014) <<https://www.freemovement.org.uk/questions-to-a-bisexual-asylum-seeker-in-detention/>> accessed 18 June 2015.

<sup>252</sup> 'FOI 27021' (106) 26.



your penis into x's backside?', 'When x was penetrating you did you have an erection?', 'Did x ejaculate inside you?' and 'What is it about men's backsides that attracts you?'.<sup>253</sup> This evidences the humiliating treatment that some LGB individuals are still uniquely subjected to, creating real concerns about the British asylum system's respect for and understanding of the right to be treated with dignity. Such questioning would not be replicated in claims based on other Convention grounds and on other PSGs, highlighting the prejudicial nature of the treatment. This also engages Principle 2 of the Yogyakarta Principles on the right to be treated with equality and non-discrimination.<sup>254</sup> The persistent sexualisation of LGB claims has led the tribunal to reproach the Home Office in a particular claim:

I want to make a comment about the Appellant's asylum interview. The Appellant was asked a series of increasingly explicit questions about her sexual activities with an alleged lover. These questions were quite inappropriate and unnecessary, bordering as they did on the pornographic. They were of absolutely no probative value: they were all leading, and could have little bearing on whether the Appellant, or anyone else considered her to be a lesbian... I therefore suggest that the Respondent desists from having officers ask such intimate questions: it is pointless and humiliating for interviewees and interviewers alike.<sup>255</sup>

The Independent Chief Inspector of Borders and Immigration confirmed the incidence of an overly sexualised approach to LGB claims. His report into LGB decision-making found inappropriate questioning of a sexual nature in 11% of all LGB claims examined, constituting 13 out of 112 claims investigated.<sup>256</sup> The Chief Inspector also found that the use of sexualised and stereotyped questions most often entered the interviews when the interviewer failed to adhere to an open questioning style, and

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<sup>253</sup> Yeo (n 251).

<sup>254</sup> International Commission of Jurists (ICJ), 'Yogyakarta Principles - Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (March 2007), principle 2.

<sup>255</sup> UKLGIG, 'Missing the Mark' (n 24) 20, citing the tribunal decision of a Cameroonian woman (Hatton Cross, September 2010).

<sup>256</sup> Independent Chief Inspector of the UK Border Agency (n 78) 15 and 20-21.

reverted to using closed questions.<sup>257</sup> This reflects the findings of this investigation regarding the use of interviews to expose the inconsistencies in claimant's narratives (section 2.2.2).

Within the empirical data, several asylum-seekers identified that they had not been subjected to such humiliating and prejudicial treatment. Not only were sexualised questions avoided, but also, the questions allowed them to present their experiences in an empowering way:

I think the questions and the topics he covered were very brilliant. They were very relevant to his assessment because he had a guide-sheet, a guideline sort of. I guess that's part of what they give him, so there were questions that he needed to cover, or areas that he needed to cover on the sheet (MASY001).

Practitioners agreed that on the whole conduct and questioning had improved. There remained problems with decision-makers' understanding of the relevant issues. This was manifested in the persistence of problematic questioning and may reinforce the inadequacy of training:

I think that Home Office officers have gotten a lot, lot better. We've seen more understanding officers, but there are still many people who don't, who aren't trained properly, and don't really understand the issues (Barry O'Leary).

Although many participants were allowed to present diverse, complex identities, several asylum-seeker participants confirmed the subsisting incidence of sexualised questioning within their own experiences of the substantive interview:

When I talk[ed] to her about the law and what actually happened, why I ran away, and the incidents, she came back to talk about how we practice sex; how we normally have sex. She talked about all that and then she wanted to know, this was what she was asking; 'how hard do you go; how do you have

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<sup>257</sup> *ibid* 20.

sex; how do you enter each other'. She want[ed] me to talk about all this. And when I stopped, she asked more about that (MASY003).

Therefore, to improve the conduct of its staff, the Home Office must address its foundational training and training on LGB issues (and extend the latter to screening officers). It must also acknowledge how the 'culture of disbelief' affects the conduct of its staff in sexual identity-based claims and work to modify this.

Two important themes emerged from the empirical data in relation to the conduct of personnel. The first is that sexualised questions are both reflective of inadequate training or practice regarding interviewing style, and of insufficient knowledge of sexual identity and diversity, especially the difference between same-sex sexual practice and holding a minority sexual identity. This was previously found by decision-makers' acceptance of sexually explicit evidence. Sexual practice does not prove one's identity. Many people engage in same-sex sexual behaviour without identifying as sexual minorities. The use of outdated conceptions of sexual identity and diversity was exemplified by FASY007's experiences, where the interviewer asked her whether she had ever slept with a man in order to clarify her sexuality:

So, um, he asked me a few questions, like, 'have you ever had sex with a man to know that you are a lesbian?' And I felt that is very, I didn't know how to say it, but it's very, ohhh.... And I thought, well, having sex with a man doesn't prove your sexuality, does it? (FASY007).

The ignorance of this question is even more troubling in the light of the training materials, which clarify the difference between sexual practice and identity:

Sexual orientation and sexual conduct are two very broad and separate (although often linked) areas. On top of that, cultures and societies are also varied as we know. It is vital we judge each case on its own merits, on a case-by-case basis.<sup>258</sup>

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<sup>258</sup> 'FOI 27021' (n 106) 29.

The second point to be derived from the sexualisation of LGB narratives within the substantive interview is that claimants are deprived of the ability to articulate their discomfort with such questioning. They are disempowered and deprived of agency due to the imbalance of power within the asylum system, especially in the light of the ‘culture of disbelief’. Claimants fear the consequences of objecting to sexualised questioning; if they object, their claims could be denied:

I wasn’t comfortable answering those questions, but I had no choice. I wanted to say ‘no’ (MASY008).

The empirical data also articulated the harm caused by ignorant questioning of a sexualised nature:

I think the level of harm that you can do to an asylum-seeker if you aren’t giving due regard to the topics that you’re asking them, the way in which you’re asking them, is something to be concerned about (Paul Dillane).

The harm can be explained in a number of ways. Refugee status in LGB claims depends on the presentation of authentic identities that decision-makers accept as genuine; interviews must enable this process. Furthermore, the high incidence of trauma and poor mental health amongst the sexual minority claimants also mandates sensitivity and respect when interacting with them. Thus, drawing decision-makers away from the sexualisation of the narrative must be addressed from the root, because it is humiliating and an affront to the dignity of LGB people. It does not help identify genuine sexual minorities, and it is harmful to claimants. The solution lies within better recruitment and training.

Although this investigation has found examples of good practice amongst personnel within the British asylum system, there are examples of systematic non-compliance with the structural principles. First, personnel engage in the unfair treatment of LGB asylum-seekers because they are also affected by the inherent partiality within the system. The ‘culture of disbelief’ empowers personnel to express their homophobia or stereotypes about asylum-seekers. This culture is extremely damaging, as despite the existence of some good guidance and training, it allows personnel to depart from

them. Thus, a great deal of decision-making is characterised by inadequate interviewing technique and the overt sexualisation of LGB narratives, despite training and guidance to the contrary. The ‘culture of disbelief’ has an impact on another structural principle: respect for LGB claimants’ fundamental rights. Indeed, the treatment of LGB asylum-seekers by many personnel neglects the rights of LGB persons to equality, non-discriminatory treatment, privacy and integrity. These are systematically ignored. Finally, although the guidance and training has been good, it is clear that such problems can only be resolved by improving the quality of guidance and training on sexual diversity and intersectionality further, and by addressing the recruitment of the British asylum system personnel. This is explored in the following sub-section.

#### **4.2 The Recruitment and Training of Personnel within the British Asylum System**

Scrutinising the recruitment and training of decision-makers within the British asylum system is crucial to investigating the fairness of LGB asylum decisions in the UK. The structural principles within the theoretical chapter highlighted that a fair asylum system must maintain minimum eligibility requirements for potential decision-makers (Chapter two). In line with the UNHCR’s standards, these consisted of university level academic qualifications, preferably in law or an asylum-related discipline, prior experience in the asylum field (through legal practice or NGO work, for example), and an active desire to work in the area of asylum decision-making.<sup>259</sup> Stringent eligibility standards would facilitate quality decision-making, which is necessary given the significant consequences of an adverse asylum decision to a person’s physical and mental security.

The insufficiency of the basic skills and experience of decision-makers was raised within the empirical data. Dillane described his concerns regarding the recruitment standards employed for decision-making roles and the consequences of recruiting individuals without the skills required:

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<sup>259</sup> UNHCR, ‘(QI) Quality Initiative Project: A UNHCR review of the UK Home Office Refugee Status Determination Procedures’ (2005-2009); ‘First Report to the Minister’ (March 2004 – Jan 2005) 3.

I think there is no specific requirement that caseowners are legally trained. I'm not necessarily saying that they should be, but I make the point that a caseowner navigating judgments like *HJ (Iran)* may not necessarily have taken away all the salient points or relevant issues (Paul Dillane).

The empirical data provided some information on the eligibility standards utilised by the Home Office. The former Home Office decision-maker interviewed for the empirical research explained that, during the period of his employment, the minimum educational requirements encompassed a specific number of GCSEs. In his experience, most of his colleagues had University degrees, but this was incidental, not a requirement:

But there were a certain number of GCSEs that you had to have, but most people applied at a considerably higher level than that, and most of my colleagues had degrees (Former Home Office caseworker).

Furthermore, he clarified that he had obtained his job through a promotion within the Civil Service and that his qualifications, including the degree that he possessed, were not required or specific to the role to which he had applied, or the role that he was promoted to do as a caseowner/decision-maker.<sup>260</sup> He contended, however, that despite the low minimum education requirements, numerous tests were conducted to ensure employees' suitability for the role:

There are rigorous tests that you would do. There's a certain amount of psychometric testing, and there are scenario tests that you do (Former Home Office decision-maker).

Although there is little information in the public domain about the Home Office's recruitment standards, an online search of job advertisements provides information consistent with the former decision-maker's claim. For example, an Administrative

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<sup>260</sup> Interview with Former Home Office decision-maker.

Officer would make ‘decisions and initial recommendations’ on asylum claims.<sup>261</sup> One such role advertised in 2008 (prior to this research) sought a minimum of 5 GCSEs in its job specifications.<sup>262</sup> For a role as a Higher Executive Officer, one of the most senior decision-maker roles, an applicant required either a university degree or, alternatively, 2 A Levels.<sup>263</sup> Furthermore, the request for prior experience is not specific to the asylum context. Consequently, it appears that the Home Office’s recruitment of decision-makers is inconsistent with the structural principles. The specifications remain too low for individuals granted such critical responsibilities, which appears to manifest itself in questionable interviewing styles and inconsistent decision-making.

This is evidenced by Dillane’s comments under section 2.2.2 of this chapter, that whilst exemplary guidance exists on LGB issues and credibility assessments, these are rarely applied, or referenced if they are applied. These experiences raise questions about the ability of decision-makers to apply guidance, in terms of their basic skills and experience, and decision-maker training.

The empirical data also identified the active demotion of standards in the asylum system. The Home Office actively reduced the seniority (and experience) required of personnel for particular roles within the asylum process. According to Erin Power, as of April 2013, the Home Office had downgraded the level of staff required to conduct asylum interviews, meaning that these were now being conducted by less experienced personnel:

Now they’ve adopted a new system that came into force on the 1<sup>st</sup> April [2013], where all those people who were trained, I don’t know what’s going to happen to them because they’ve lowered the grading of a person who now

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<sup>261</sup> Get Smaart, ‘UK Border Agency Officer’ <<http://getsmaart.com/career-overviews/uk-border-agency-officer>> accessed 15 November 2015.

<sup>262</sup> UK Visas and Immigration, ‘Asylum Casework Directorate: Administrative Officer (Job Advertisement)’ (*Online Jobs*, October–November 2013) <[https://www.online-jobs.co.uk/ukba/Documents/UKVI0044\\_Information\\_for\\_Applicants.pdf](https://www.online-jobs.co.uk/ukba/Documents/UKVI0044_Information_for_Applicants.pdf)> accessed 15 November 2015.

<sup>263</sup> Home Office, ‘Higher Executive Officer (HEO) Case Owner & Presenting Officer (Job Advertisement)’ (*jobsgopublic*, May–June 2014) <<http://www.jobsgopublic.com/job/higher-executive-officer-heo-case-owner-presenting-officer-n-a/rss>> accessed 15 November 2015.

does interviews. So instead of being at a particular public service grade, they've dropped it one so they can save money (Erin Power).

This is an extremely important issue. The Home Office's adoption of such cost-saving measures appears to actively contribute to Erin Power's description of 'the slipping of standards' within LGB asylum decision-making. This investigation has already identified problematic questioning styles in LGB claims (section 2.2 and 4.1 above). Downgrading the quality of staff conducting the substantive interviews suggests that problematic questioning will not only persist, but also perhaps worsen. The importance of these issues is underscored in the following paragraphs in relation to cost efficiency in an era of scarce resources.

The economic dimensions of this discussion are especially important to the issue of training. The training provided to decision-makers is examined within this thesis from two perspectives. The first is with regard to the initial training provided to employees recruited by the Home Office to become asylum decision-makers. The second concerns the training available on LGB issues. On the initial training, the Home Office responded to the first Freedom of Information request, outlining that a '25 day Foundation Training Programme' was provided to all new asylum decision-makers in-house by the Asylum Casework Directorate Learning Development team.<sup>264</sup> The Home Office Presenting Officer Units were also provided with an adapted version of the course by the 'appeals training team'.<sup>265</sup> With regard to the second perspective, the Home Office explained that over 2010-2012, the 'Learning and Development team trained all existing decision-making staff' on LGB issues, with the training now being 'incorporated into the 25 day Foundation Training Programme'.<sup>266</sup> The Home Office made available to the researcher the training materials on LGB issues. These have formed a core part of the analysis of the British asylum system within this thesis.

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<sup>264</sup> FOI 27021 (n 106) 5-6.

<sup>265</sup> *ibid.*

<sup>266</sup> *ibid.*



The empirical data highlighted several issues with both of these training components. With regard to the foundation training, it appeared that the training provided to new decision-makers was of reduced quality and rigour when compared to the previous training. The former Home Office decision-maker received training on two occasions, first in his capacity as a caseworker, and subsequently, in his enhanced capacity as a caseowner. When comparing these two training programmes, the interviewee highlighted that the first training that he received was of better quality, despite the fact that the second training was for an advanced role:

If I was completely candid, I'd say the training I had as a caseworker was far more rigorous than the training I had as a caseowner. And the job, as a caseowner, was supposed to be a more overarching role that had responsibility end to end in the process... But the training for that process was an awful lot less detailed, and an awful lot less rigorous than the training for the job of someone who was a dedicated worker, who may not be involved at initial screening stages, but would be involved at the interview stage, the decision-making stage, the implementation of the decision (Former Home Office decision-maker).

The interviewee experienced a disparity in the rigour and quality of training provided to him on two occasions, although the second role was the more expansive and demanding. He emphasised that both training periods took place over 'weeks and weeks'. The interviewee did not provide figures for both training periods, but described the length of the later training for the caseowner role:

Even the second time that I did my training when I was training to be a caseowner, that took 60 days (Former Home Office decision-maker).

It is possible that the reduced length of the second training period did not sacrifice quality for efficiency. It is difficult to believe, however, that the Home Office could legitimately create training of a reduced duration for a more demanding role. The interviewees' prior experience and training did not appear to be a factor in the development of the second training, thus it cannot be that the latter training programme was intended to be supplementary. The interviewee's identification of the

reduced quality of the latter training supports the ‘slipping standards’ contended by Erin Power above. He described this in his own terms:

I have seen a decay in the quality of training myself, as I’ve explained to you. The early training I had was of the highest standard, and the later training that I had was possibly adequate, and it was adequate because I’d had previous training (Former Home Office decision-maker).

This statement is even more powerful when comparing this training to that in operation today. The further reduction of training that the former decision-maker had described as ‘adequate’ is extremely concerning. From the Home Office’s response to the Freedom of Information request, it is clear that the training programme has been reduced further from 60 days to 25. This must represent another significant compromise in the quality and/or rigour of the training, supported by the extensive problems with the decision-making that have been identified within this investigation, at both substantive and procedural levels. If the interviewee was able to call the 60-day training ‘adequate’ only because of the prior training that he had received, the 25-day training period cannot be sufficient. This comparison provides a powerful statement on the Home Office’s commitment to exemplary training standards and its understanding of the fundamental role of training in a fair asylum system. If decision-makers do not have the skills to make correct and properly assessed decisions, the process cannot be fair.

These concerns were replicated within the empirical data amongst practitioners, who specifically highlighted poor interviewing skills amongst Home Office personnel:

You do see, simply from the SEF [Statement of Evidence Form] interviews [transcripts] that I see over many years, both as a practitioner and here at Amnesty at intervening cases, a great level of divergence in the way in which people are interviewed, and I think that that is symptomatic there is a need for greater attention to the training they receive (Paul Dillane).

Thus, it is clear that a substantial cause of the problems within decision-making lies with the quality of the initial training of new decision-makers. Erin Power identified

above that the Home Office is using less experienced personnel to conduct substantive asylum interviews as of April 2013. It appears likely, therefore, that during the process of researching and writing this thesis, interviewing standards will have continued to deteriorate.

With respect of the training on LGB issues, participants of the empirical research commended the Home Office. Practitioners praised the development and implementation of training where none had existed before, and the consultation of NGOs with extensive experience when developing such materials. As the Home Office identified, the training was developed with the UNHCR, and NGOs such as Stonewall and the UKLGIG.<sup>267</sup>

The Home Office have actually got better in recent years, of actually letting outsiders into this...our experience definitely is that there is undoubtedly better training, mainly through the work of the UKLGIG (Barry O'Leary).

Practitioners also commended the Home Office for subjecting all decision-makers to compulsory training on LGB issues over 2010-2012, resulting in the tangible improvement of decision-making.<sup>268</sup> Since this period, however, Erin Power reported that the training had been modified. Whereas a full one-day course was initially provided, this was now a reduced part of the initial training programme for new decision-makers. Consequently, they feared that previously eradicated issues were returning to the determinations of LGB claims:

Two years ago now, they trained every single caseowner in the country, a formal one-day course, which was huge. And we did see decisions change, so we saw far, far better questioning, much less focus on sexual activity, Western stereotypes. But I think they're slipping, I think some of the old questions are slipping back in because it's different people now and they don't get a whole day, it's just part of the overall training to be caseowners (Erin Power).

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<sup>267</sup> *ibid.*

<sup>268</sup> Interview with Erin Power.

This comment is important, as it summarises some of the key findings of this investigation, in terms of the narrow, closed questioning, focus on sexual behaviour rather than identity, and the restrictive understandings of sexual diversity, and links these issues to poor training. Dillane also highlighted the problem of training, pointing out the conflict between the training and guidance on LGB matters, and the on-going rejection of LGB claims on spurious grounds:

My problem is that if that training had been sufficient and if these internal documents, which are laudable, were sufficient, we wouldn't continue to see the types of refusal decisions that we're seeing today. So there's a problem there (Paul Dillane).

On this basis, the empirical data identified concerns regarding the quality of the training on LGB issues, as discussed above. Participants also accentuated the need for training to be offered regularly to embed the content within the minds and decisions of decision-makers personnel:

You can't talk to a group once in 2011 and then think that that's okay then. You've got to continually, continually, continually inform your staff, train your staff properly, because some staff will get it straight away, some interviewing officers, it could actually just be an ignorance to really understand what it is about sexual identity (Barry O'Leary).

It is insufficient for decision-makers to be trained on LGB issues at the outset of their training, never to return to the matter. In the response to the initial Freedom of Information request, the Home Office stated that decision-makers had the option of repeating the training, if they felt it was necessary. The choice implied is problematic because it enables decision-makers to never return to the training on LGB issues, should they feel it unnecessary. Erin Power also highlighted the danger of allowing decision-makers such discretion, as many failed to acknowledge that they needed training in the first place, let alone that they required it again.<sup>269</sup> Training must be

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<sup>269</sup> 'FOI 27021' (n 106) 5. The FOI states that 'the training is available to be repeated as necessary', presumably granting decision-makers or their supervisors the discretion to decide whether additional training is required. The impetus for decision-makers to do so is weak, however. As highlighted by

repeated regularly to ensure that the content is embedded within decision-makers' understanding, abilities and skills. Moreover, although an initial course may introduce the issues relevant in sexual identity-based asylum claims, the scope for learning is not exhausted. The empirical research underscored an evolving approach to the training on LGB issues. Training needed to, first, address the most pressing issues and, then, move onto more complex issues of identity:

There's not enough emphasis about identity, so that needs to be changed. There needs to be more work about what is LGB, because there's an awful lot of stereotypes flying out there which is a very Western, even London-centric kind of view of what LGB is (Professional Participant A).

Training on LGB issues is not an issue that only regards Home Office decision-makers. The empirical data addressed the training and knowledge of immigration judges:

Judges aren't trained, so when we are talking about training we are talking about the Home Office, so judges need to be trained. They've had two talks, but they were voluntary attendance (Erin Power).

It is troubling that immigration judges are not subjected to compulsory training. As this investigation has found, tribunal judges also committed many of the same mistakes found within the Home Office with respect of LGB asylum decisions. Tribunal decisions were also inconsistent. Judges essentialised LGB identities, ignoring sexual diversity, and failed to take an intersectional approach to such claims. Judges also misapplied evidentiary thresholds, subjecting LGB claims to prejudicial treatment and the burden of proving their sexual identities. The lack of compulsory training for judges is also important in the light of Erin Power's experiences of resistance to training on LGB issues within the Home Office.<sup>270</sup> The voluntary nature of the talks allows immigration judges to defer to their 'superior knowledge',

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the empirical data, many decision-makers believed that they did not need such training, despite admitting subsequently that they had learned from it: 'People were like, "I don't need to be trained, I know how to do this". But after the training, they were saying, "No, I really didn't know. I have learned a lot"' (Erin Power).

<sup>270</sup> *ibid.*

rejecting the scope for greater learning. The inconsistency of tribunal decisions demonstrates that this discretion is dangerous at appeal level too. Without certain assurances, which depend on compulsory training, one cannot be confident that tribunal judges have the knowledge and skills to understand the unique challenges of LGB claims. As highlighted in Chapter two, perceptions of fairness are just as critical as their practical operation.

The empirical data also emphasised the importance of training legal representatives on LGB issues. This would ensure that more representatives would be competent enough to represent LGB claimants, reducing the pressure on those who have developed a reputation for their expertise in such claims. Regardless of duties of cooperation in the UK system, the burden of proof ultimately lies on the claimant. A representative should be in a position to help a sexual minority asylum-seeker to best present their claim. Training can facilitate this. A participant of the empirical research explained that this issue involved ensuring that legal representatives could access such training on LGB asylum issues throughout the country. Whilst such training would be accessible in London, the dispersal of LGB asylum-seekers across the country means that such training must be available to representatives outside the capital:

We know there are huge swathes of the UK where refugee lawyers simply will not be able to access that training conveniently and if you are really looking to improve standards across the UK, that training needs to be outside of London as well. I do think that there are very junior lawyers who are trying to do the best that they can with the knowledge that they have, but that training and materials can help them to understand and represent the client to the best of their ability (Paul Dillane).

This examination has demonstrated a key problem with the procedural fairness of the asylum system for LGB refugees, which lies not only with the rigour and quality of the training delivered to new asylum decision-makers, but also with the truncated, static and one-off nature of the training that is delivered on LGB issues. Poor quality training, alongside poor recruitment standards are in themselves procedurally unfair, and have contributed to the other issues of procedural and substantive fairness that

have been identified throughout this investigation of the British asylum system from the sexual minority perspective. The training of immigration judges and of legal representatives is also a significant part of this overall problem. Until the quality, rigour and repetition (and voluntary nature) of all training are not addressed, the overall fairness of the system cannot improve. Poor training is inextricably linked to poor understandings of refugee law, leading to substantive unfairness also.

Aside from the concerns regarding the length, quality and delivery of training, an additional issue is the well-being and retention of decision-makers. The empirical data highlighted that the Home Office struggled to retain its staff:

They have a huge issue with staff turnover in this area. People won't stay (Erin Power).

The former Home Office decision-maker interviewed in the empirical data confirmed the high staff turnover:

Most of my colleagues have left, who I worked with at the time, have left the asylum business proper, and may still work in the Home Office, but have got out of asylum (Former Home Office decision-maker).

There is a valuable lesson within these comments. It is essential to an efficient asylum system that it retains its decision-makers, particularly those who have amassed a significant amount of experience and skills. The consequences of not addressing a high staff turnover are the economic costs of constantly recruiting and training new staff to the high standards necessary, and the negative impact on the quality of decision-making. It is for this reason that the UNHCR and the structural principles in Chapter two emphasise the importance of recruiting individuals with a desire to work within the field of asylum. Without such motivation (and the necessary working conditions), it appears that decision-makers eventually transfer to other roles within the civil service. The excerpt above highlights this.

There is an important component to this issue regarding the well-being of the Home Office decision-makers. In the empirical data, the former Home Office decision-

maker spoke of the rapid ‘burn-out’ of decision-makers due to the target-driven culture of the Home Office, and the constant exposure to traumatic experiences:

When I entered into the job, we were told, doing this job has an 18 month, two year burn-out time, because it’s like I told you, best case scenario, you’re giving someone bad news, whatever you tell them. And the things that you have to research, the photographs that you see, and the accounts that you read – so if you become inured to that, then it’s really quite bad (Former Home Office decision-maker).

The emotionally charged nature of the work, exposure to trauma and persecution, and the pressures of the role, mean that trained decision-makers do not stay in the position, preferring other civil service roles.<sup>271</sup> It is in the Home Office’s economic interests to address this, as it would reduce the continued need to recruit new decision-makers and retain experience within the institution. It would also allow the Home Office to focus on improving the skills of its staff, rather than ensuring that they are merely able to function.

It is important to place these arguments regarding the economic efficiency of better training and retention of decision-makers in the context of scarce resources:

So there are various changes nowadays. You have the problem of spending cuts, but you also have the question of how to embed the side of culture, the part of human rights culture, like LGBTI people’s rights (Joël Le Déroff).

Understandably, public authorities are faced with the challenge of making their asylum systems more cost-effective in an era where political and economic considerations are paramount. As stated in Chapter two, the British asylum system is forced to balance these concerns with the requirements of fairness in the asylum context. The former Home Office decision-maker explained that political and economic concerns dictated the ‘under-resourcing’ of the asylum system:

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<sup>271</sup> UNHCR, ‘QI Project: First Report’ (n 259) 10. The tendency for Home Office decision-makers to move to other Civil Service roles was also confirmed by the empirical data, in the interview with the former Home Office decision-maker.



Without this becoming a political conversation, the problem of under-resourcing of the Home Office, and the under-resourcing of training of Home Office staff... the point that I'm making is that there are processes outside the asylum process, which politicise the asylum process. So without those being addressed, the Home Office is an easy scapegoat (Former Home Office decision-maker).

One appreciates that in the exercise of balancing political and economic factors with the requirement of fairness in the asylum context, it could appear logical to reduce expenditure through personnel, i.e., recruitment, training and salaries. The imposition of targets is another strategy. This is short-sighted, however, as the cost-cutting approaches of the Home Office have led to an asylum system that is unfair, inefficient and expensive. This is demonstrated by the fact that not investing in the high-quality training of Home Office decision-makers means that the initial decision-making stage is neglected. By weakening the quality of initial decisions, more rejected claims are taken to the immigration tribunal and appellate courts (where they are often overturned), to the system's expense.<sup>272</sup> This unfair, expensive and inefficient system could be addressed by a greater number of correct decisions in the first instance. For emphasis of this argument, it is valuable to restate the former Home Office decision-maker's comments on the culture of initial decision-making:

There's always at the back of people's mind a failsafe, that if I make the wrong decision and it's a refusal, well, it'll go to court, and the person will appeal, and the judge will grant them. Well that's a very expensive and inefficient process (Former Home Office decision-maker).

This excerpt emphasises the complicity of Home Office decision-makers in their poor decision-making, and in the inefficiency of the British asylum system. This is even more troubling given the problems with tribunal decision-making. In cases where the tribunal makes an incorrect decision, claimants must take their cases to the appellate courts, or return to the Home Office to make further representations. Yet, it is

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<sup>272</sup> See Chapter One for details on the number of claims that are allowed on appeal.

important to underscore that this is not the fault of individual decision-makers, but the overarching culture and demands of the public authority. In order to satisfy the public demand that immigration be managed strictly, the fairness of decision-making has been disregarded:

They're always going to respond to a public attitude. No government is going to say, 'Look, let's open the doors to particularly vulnerable people' and expect to stay in power. So until you change the way people see our clients, then we're always going to be carrying out a battle, aren't we? We're always going to be up against, no matter how pretty the system was, there's an underlying 'deny, refuse, get them out'. That is the underlying, whatever pretty policies and pretty trainings and apparently fair processes exist, the underlying message is 'do not grant, do not allow' (Erin Power).

The investigation into the recruitment and training standards of the British asylum system has revealed their non-compliance with the structural principles. Not only has the Home Office failed to adhere to UNHCR guidelines on the minimum qualifications and experience required from employees recruited to make asylum decisions (which the structural principles adopted), but it has also downgraded the quality of staff required to conduct asylum interviews. Similarly, on the matter of training, the Home Office's training programme is inadequate. The degradation of the quality of training over the years is clear; the substantially reduced duration of the training has undoubtedly sacrificed its quality. Additionally, the sacrifice in the quality of training on LGB issues, and the Home Office's failure to understand that its repetition is fundamental to the improved understanding of sexual diversity amongst decision-makers, is damaging. Moreover, there is no compulsory training on LGB issues for tribunal judges. It is clear that these two issues can explain certain problems identified in this investigation regarding unfair decision-making in LGB claims. The solutions to providing a fairer asylum system for LGB asylum-seekers are complex, multi-layered and interlinked. The internal culture of decision-making within the Home Office, however, highlights the institution's vulnerability to political issues. These cannot be resolved easily.

## 5. Conclusion

This procedural investigation of the British asylum system has demonstrated that the system is capable of treating LGB asylum-seekers fairly. In many areas, it has successfully discharged its obligations towards LGB asylum-seekers under the structural principles, for example, by rejecting the submission of sexualised evidence, empowering claimants to present diverse narratives, and not detaining LGB victims of torture.

Nonetheless, throughout this chapter, the persistent examples of negative treatment and decision-making demonstrate that too often the system is inconsistent and unfair towards LGB claimants. First, the system's fundamental rights obligations towards LGB claimants are repeatedly ignored. As a result, claimants must make significant compromises with the right to privacy during the interviewing process (accepting the sexualisation of their narratives), for example, when trying to 'prove' their sexualities through documentary evidence and when seeking medical care whilst detained. The physical and mental health impact of detention on LGB claimants is ignored, as are histories of torture and trauma on the suitability for detention or DFT. The Home Office ignores enforced discretion within detention, whilst recognising its gravity in the context of persecution and the refugee definition. This shows that the British system either remains ignorant, or is not serious about how LGB individuals' fundamental rights operate. Secondly, the British asylum system's inconsistent, inflexible and often stringent operation of the evidentiary thresholds excludes deserving LGB claimants from protection, in light of the inappropriate way it applies the 'reasonable degree of likelihood' and 'benefit of the doubt' tests in relation to documentary evidence and narrative evidence. Here too, the resistance towards intersectional decision-making and understanding of sexual diversity means that evidentiary thresholds stand as lofty barriers against granting protection to complex sexual identities.

The unfair treatment of LGB claimants can be understood with further reference to the structural principles. The issues uncovered in this chapter place substantial

pressure upon legal representatives to overcome the flaws within the system. Representatives must take specific steps to pre-empt the poor decision-making of the system, giving their clients the best chances of success. This often results in representatives believing that compromising their clients' rights is necessary to secure refugee protection. Detention and DFT force LGB claimants to access legal representatives without the necessary competence in sexual identity-based asylum claims. As a result, numerous claimants are compelled to remain in detention for longer, at great personal harm, to access an appropriately skilled representative.

With regard to guidance itself, this chapter has evidenced that, whilst the guidance is broadly of good quality, the British asylum system fails to integrate into its training and guidance the knowledge of human memory and the impact of trauma on memory. The consequence of this is that LGB (and other) claimants are subjected to inscrutable standards at interviews and within the RSD with regard to what is considered to be true and rational behaviour. They are punished over acceptable and natural inconsistencies in their narratives through the deprivation of refugee protection. Nonetheless, good guidance cannot always ensure fair decision-making. There are repeated examples of the disconnect between the content of training and guidance, on the one hand, and the decisions refusing LGB claimants refugee protection, on the other hand. Additionally, on the issue of training, the overall quality of the training, both in terms of the foundation programme and the training on LGB issues, must be overhauled. Moreover, the ongoing training needs of decision-makers, particularly on understanding the breadth and complexity of sexual diversity, have been insufficiently addressed.

Finally, partiality within the asylum procedure has the greatest influence on the fair treatment of LGB asylum-seekers. The clear presence of a 'culture of disbelief', both in terms of the attitudes of individual personnel and the culture of the Home Office as an institution, has impacted severely the system's compliance with the structural principles. The impact of this culture can be seen in the credibility assessments of narrative and documentary evidence, decisions regarding the suitability for detention and DFT, the administration of healthcare and consideration of medical issues, the attitudes of personnel, and the truncated quality of training for decision-makers. Furthermore, the 'culture of disbelief' has enabled the poor understanding of sexual

identity to persist, facilitated by homophobia and reduced, infrequent and static training. As a result, although many of the issues discussed in this chapter also affect claimants seeking protection on other grounds, this ignorance means that LGB claimants experience these issues most acutely. It also ensures that there is little motivation to improve the fairness of the system by conducting intersectional decision-making that applies the correct evidentiary standards.

Compliance with the individual structural principles is intertwined. For example, the bias and poor training and recruitment standards impact the respect for fundamental rights, access to legal representation or adherence to guidance. Given the additional layer of political and economic discourses affecting the operation of the British asylum system, it is clear that there are no shortcuts to securing a fair asylum system for LGB asylum-seekers.

## Chapter Five

### CONCLUSION

#### 1. Introduction

This thesis investigated the fairness of the British asylum system for asylum-seekers claiming protection on the basis of their sexual identities. The research makes an original contribution in two crucial ways: first, by drawing on a range of theoretical perspectives to probe the idea of fairness in the British asylum system, and second, through the collection of qualitative data on the diverse experiences of asylum-seekers and stakeholders working within the asylum system. Most importantly, the latter comprised of detailed interviews with these stakeholders and two Freedom of Information requests submitted to the Home Office, allowing access to an unusually rich and diverse set of data.

This thesis critically analysed, from a legal perspective, the treatment of sexual identity-based asylum claims in the UK. The seminal case of *HJ (Iran)*<sup>1</sup>, which has been lauded as correcting certain historical injustices towards LGB asylum claims, played an important role in this thesis.<sup>2</sup> By examining LGB decision-making in the post-*HJ (Iran)* climate, this thesis addressed an identifiable gap in the current research. Limited research focusing on the perspectives of LGB asylum-seekers themselves, also led to this thesis using empirical data to foreground the experiences of sexual minority asylum-seekers.

The methodology of this investigation was inspired by evaluation theory (Chapter one) and permitted the appraisal of the UK's treatment of LGB asylum claims to be steeped openly in values encompassed by fairness. The methodology also pursued a

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<sup>1</sup> *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* [2010] UKSC 31.

<sup>2</sup> S. Chelvan, 'Put Your Hands Up (If You Feel Love)' (2010) JCWI Bulletin 56, 57.

mixed methods approach, combining the (initial) doctrinal research process with a subsequent qualitative empirical research component. Through a socio-legal approach, this investigation could focus on analysing the experiences of LGB asylum-seekers in the UK. Juxtaposing the legal critique of the asylum process with insight into the human experience is critical for three reasons. First, a socio-legal approach foregrounds the dignity of asylum-seekers by examining their responses to different facets of the asylum process. This is often missing from legal analyses. Secondly, it focuses on the empowerment and cooperation of the claimant, without which the asylum process cannot take place effectively. Emotions of fear, vulnerability and mistrust, for example, drive the way that a claimant navigates the system, and thus heavily influence whether the claim is successful and whether the procedure itself is considered so. Thirdly, the socio-legal approach of this thesis places the investigation within a broader context, relating to the perceptions of the asylum system and of migration within British society.

Finally, the principles of intersectionality and sexual diversity advanced within the introductory chapter helped to further set the parameters of this investigation, particularly in relation to the nature and content of sexual identity. A strong resistance has developed within queer theory to understanding sexual identity within the ‘heterosexual/homosexual’ binary.<sup>3</sup> Moreover, the models for understanding ‘queer’ identities do not account for affiliation with multiple groups simultaneously, such as on grounds of race or religion, for example.<sup>4</sup> Researchers have documented how sexual minorities are often encouraged to self-categorise in ways that prioritise the sexual identity, by neglecting other important identity categories. This ignores the fact that an individual’s experience of the world is shaped by their multifaceted affiliations.<sup>5</sup> Restricting the characterisation of LGB identity through the perspectives of white sexual minorities, due to their ‘cultural visibility and academic productivity’, has, therefore, helped further advance the values of this thesis.<sup>6</sup> Prior to conducting

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<sup>3</sup> David Valentine, “‘I Went to Bed with My Own Kind Once’: the Erasure of Desire in the Name of Identity” (2003) 23(2) *Language & Communication* 123-138, 123.

<sup>4</sup> Layli Phillips and Marla R. Stewart, “‘I Am Just So Glad You Are Alive’: New Perspectives on Non-Traditional, Non-Conforming, and Transgressive Expressions of Gender, Sexuality, and Race Among African Americans” (2008) 12(4) *Journal of African-American Studies* 378-400, 379.

<sup>5</sup> *ibid* 380.

<sup>6</sup> *ibid* 381.

this investigation, it became clear that a fair system for LGB asylum-seekers hinges on caseworkers and decision-makers grasping the diversity and complexity of LGB identities. Sexuality cannot be contemplated in isolation. Sexuality should be considered in conjunction with the influence of other identity categories on one's life experiences, and specifically, their confluence. These include categories such as: sex, race, gender, education, culture and class.<sup>7</sup> The principles of intersectionality and sexual diversity have thus informed an analysis that sought to capture the variability in the experience of the asylum process. It also captured the variance in decision-making, depending upon the complexity of a claimant's identity, and its potential for recognition by the decision-maker.<sup>8</sup> This applies not only to procedural aspects of the British asylum system, but to substantive matters too, such as the need to view the Refugee Convention as an evolving instrument, such that legal tests are grounded in the changing attitudes towards sexual identity.

By way of example, the empirical data examined the case of FASY003, a Pakistani lesbian, whose poor education and ongoing internal debate regarding her sexual identity were issues important to her persecutory narrative and experience of the asylum system. Similarly, for FASY009, a Nigerian lesbian, socio-economic factors and experiences of racism dictated her ability to document her sexuality within the UK.

This thesis grappled with the idea of fairness, querying whether it held enough substance to direct and inform the investigation of the British asylum system. If it did, what should be the standards of fairness in the asylum system? To what kind of treatment were LGB (and other) asylum-seekers entitled? Consequently, Chapter two explored the substance of fairness, using legal theory to explain the importance of fair treatment.<sup>9</sup> Fairness describes how the inherently unbalanced relationship between

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<sup>7</sup> Danielle N. Shapiro, Desdmona Rios, and Abigail J. Stewart, 'Conceptualizing Lesbian Sexual Identity Development: Narrative Accounts of Socializing Structures and Individual Decisions and Actions' (2010) 20(4) *Feminism & Psychology* 491-510, 492; Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *U. Chi. Legal F.* 139.

<sup>8</sup> Sarah Hinger, 'Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims' (2010) 19 *Colum. J. Gender & L.* 367, 390-392.

<sup>9</sup> Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality and Species Membership* (Belknap Press, 2007) 10-11.



the state (and its power) and the individual should be governed. In this way, fairness encompasses the tacit equilibrium of the social contract, which mandates that states exercise their decision-making power with respect for the fundamental rights of individuals and their dignity.<sup>10</sup>

Fairness is also a touchstone of the UK legal system. Fairness is shaped through provisions of UK administrative law, international human rights law and supranational treaties, such as those enabling the UK's membership of the EU and its ability to legislate on asylum matters. In Chapter two, these provisions helped to create structural principles outlining the basis of a fair asylum system for LGB asylum-seekers. For the ease of analysis, the principles were divided into those required to achieve substantive fairness and those necessary for procedural fairness. Most importantly, these principles were used as the analytical framework for the subsequent investigation of the British asylum system. Although the principles are used to examine LGB asylum-claims, they are significant because they articulate standards deserved by all asylum-seekers. Thus, this framework forms a substantial part of the original contribution of this thesis, not only because of the standards espoused in the LGB context, but also because the framework can be used to evaluate the fairness of decision-making on all asylum grounds.

Chapters three and four conducted the investigation into the British asylum system, examining the law and policy, and its implementation on various issues, with recourse to doctrinal and empirical data. Chapter three analysed the UK system for LGB asylum-seekers with respect to substantive fairness. To do so, it relied upon the legal framework established by Article 1A of the Refugee Convention. The chapter focused on issues pertaining to claimants fulfilling the Article 1A criteria, establishing their entitlement to refugee protection. It scrutinised the outcome of LGB asylum claims, examining whether the decision-makers' RSDs were conducted fairly with respect of the Article 1A criteria.

The conclusions of Chapter three mapped directly onto the components of substantive fairness identified in the structural principles of Chapter two. It found that the *HJ*

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<sup>10</sup> John Locke, *First Treatise of Government*, 42.

(*Iran*) decision had improved the fairness of decision-making. For example, on issues of internal relocation and discretion, the British system often made nuanced decisions in recognition of the fundamental rights of LGB asylum-seekers. It also found, however, ongoing problems regarding LGB rights. The developing understanding of how sexual identity engages with fundamental rights resulted in the failure to respect LGB claimants' fundamental rights, rigid (and exclusionary) approaches to the refugee criteria, and the misapplication of evidentiary standards. Procedural tools provided greater insight into this non-compliance with the substantive structural principles. A significant factor was *HJ (Iran)*'s facilitation of structural, cultural and evidentiary problems by entrenching disbelief into the analysis with respect to the claimant's sexual identity. Furthermore, the bias embedded within the British system by the 'culture of disbelief' enhanced the role of legal representatives in surmounting the obstacles within LGB claims. It also placed great strain upon a limited number of representatives experienced in such claims.

Chapter four conducted the investigation into the British asylum system with regard to procedural fairness. This concentrated on the procedural aspects of asylum decision-making, including a primary focus on the credibility assessments of LGB claimants. This process is not about fulfilling the refugee definition. Rather, the decision-maker determines whether he or she believes the narrative of identity and persecution presented.<sup>11</sup> The credibility assessment is perhaps the most important part of asylum decision-making, as the assessment takes place at two stages, concerning documentary evidence and/or narrative evidence.<sup>12</sup> As the 'credibility' of an asylum-seeker is at the heart of the asylum claim, procedural fairness is even more important to the asylum system than in other areas of administrative law. The entire success of an asylum claim hinges on whether a decision-maker finds the applicant credible enough to warrant protection.

The conclusions of Chapter four mapped onto the components of procedural fairness under the structural principles. For example, LGB claimants were disproportionately

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<sup>11</sup> Michael Kagan, 'Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination' (2002) 17 Geo. Immigr. LJ 367, 371-375.

<sup>12</sup> James A. Sweeney, 'Credibility, Proof and Refugee Law' (2009) 21(4) International Journal of Refugee Law 700-26, 710-711.

subjected to detention and DFT, raising questions about partiality within the asylum system. The chapter also identified issues with the quality of training, the conduct of personnel, the role of legal representatives and the quality of guidance on issues relating to memory and trauma, each of which relate to specific structural principles. As in Chapter three, however, many components of the asylum procedure had substantive implications. For example, DFT, detention and interview (in the form of sexualised questioning) reflected disregard for the fundamental rights of LGB claimants. Insufficient guidance and disbelief also distorted the evidentiary standards applied within the credibility assessments of LGB claims. Thus, whilst the substantive and procedural separation worked, their intersection simultaneously underscored the system's complexity and correspondingly, claimants' need for high standards of substantive and procedural fairness in order to access a fair asylum system.

The conclusions drawn from this investigation are now pulled together in a series of concluding observations outlined below. These conclusions describe the British asylum system's ongoing failure to understand the characteristics of sexual identity, namely their intersectional and diverse nature. They also emphasise how sexual minority asylum-seekers are forced to navigate the asylum procedure within the UK in ways that are prejudicial and ignore the fundamental rights implications of such unfair treatment. Subsequently, these conclusions place the unfair treatment of LGB asylum-seekers within a broader context of poor standards within the British asylum system overall, before describing some final thoughts on the unfair treatment of LGB asylum-seekers and areas of further research.

## 2. Insufficient Understandings of Sexual Diversity and the Intersectional Nature of Identity

This investigation has uncovered examples of good practice on matters of substantive and procedural fairness within the British asylum system and of certain improvements within the British asylum system's treatment of LGB claims. Yet, from the problems identified, it is clear that decision-makers and officials hold a poor understanding of

sexual identity, which is reflected in substantive and procedural matters alike. First, the system continues to fail in its understanding of how the experiences of LGB asylum-seekers engage human rights standards. For example, with regard to the actual asylum procedure, officials remain ignorant as to why LGB people are vulnerable to serious physical and mental harm in detention (Chapter four). The empirical data shared the perspective of LGB claimants who hid their sexualities to avoid harm, emphasising this argument.

The failure to understand LGB rights also exists regarding substantive matters pertaining to the refugee definition. The UK system does not recognise the serious nature of even the ‘mere existence’ of legal sanctions criminalising same-sex sexual relations (Chapter three). According to the UK system, the ‘mere existence’ of sanctions alone cannot meet the thresholds of persecution, although this thesis contends that their impact is persecutory.

Secondly, the failure to understand sexuality is also exemplified by the system’s ongoing conception of sexual identity as a form of behaviour, not identity, despite guidance and training to the contrary. The focus on behaviour is exemplified most clearly by the construction and interpretation of the five-stage test advanced by Lord Rodgers in *HJ (Iran)* on determining LGB claims (Chapter three). Decision-makers are instructed to apply a test centred on the degree of ‘openness’ with which the claimant would choose to live. Yet, a claimant’s ‘openness’ does not necessarily dictate the seriousness of the risk of persecution. Furthermore, discretion does not repudiate the risk of harm. Despite the CJEU identifying in the case of *X, Y and Z* that discussions on discretion or concealment have no place in the RSD,<sup>13</sup> the *HJ (Iran)* test remains unchanged.

The empirical data provided greater insight into the conflation of identity and behaviour. For example, one of the reasons for refusing MASY003 protection was the assertion that he would be voluntarily discreet upon return to Ghana. In a separate example, the asylum-seeker interviewees provided documentary evidence consisting

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<sup>13</sup> Joined Cases C-199/12, C-200/12 and C-201/12, *X, Y and Z v. Minister voor Immigratie, Integratie en Asiel* [2013] [70].

of expressions that consciously engaged the public domain, such as bars and clubs, Pride events, dating and support groups. This would enable decision-makers to perceive their desire to live open lives in the UK, which they were prohibited from doing in their home societies. The empirical data highlighted this further. Legal representatives described the challenge to help a claimant articulate in their narrative evidence how they would be forced to act discreetly in their home country, not voluntarily, but to avoid persecution. Accordingly, the empirical data highlighted the influence of ‘openness’ on moderating claimants’ and representatives’ navigation of the process.

The explanation for these two issues lies in the key concepts of this thesis, intersectionality and sexual diversity. The fair treatment of LGB asylum claims fails because the system does not recognise that intersectionality is critical to the ‘lived experiences’ of sexual minority asylum-seekers, especially those who are also ethnic minorities (i.e., not from white European backgrounds).<sup>14</sup> Decision-makers produce their decisions through the lens of narrow Western conventions on sexual identity.<sup>15</sup> These stereotypes, including the Western ‘LGBT’ framework of minority sexual identity, are largely based on the experiences of white, middle-class and gay men.<sup>16</sup> Such stereotypes have been critiqued heavily within traditional asylum-receiving states for not reflecting the diversity of experiences within Western LGBT communities, as described above, and it is clear that they alone are insufficient for use in the context of sexual identity-based claims. Many, if not most, LGB asylum-seekers, not having been raised in the West, can struggle to relate their experiences to these constructions of identity.<sup>17</sup> Indeed, within the empirical data, many asylum-seeker participants were initially unfamiliar with the ‘LGBT’ framework. Only by

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<sup>14</sup> Phillips and Stewart (n 4) 384.

<sup>15</sup> Cheryl A. Parks, Tonda L. Hughes and Alicia K. Matthews, ‘Race/Ethnicity and Sexual Orientation: Intersecting Identities’ (2004) 10(3) *Cultural Diversity and Ethnic Minority Psychology* 241–254, 241–242.

<sup>16</sup> *ibid.* See also, Joseph Adoni Massad, ‘Re-Orienting Desire: The Gay International and the Arab World’ (Spring 2002) 14(2) *Public Culture* pp. 361–385, 361–362. This article charts the ‘missionary’ role that the LGBT rights movement has taken to ‘globalise’ LGBT rights through an inherently ‘orientalist impulse’.

<sup>17</sup> Hinger (n 8) 390–395; Connie S. Chan, ‘Issues of Sexual Identity in an Ethnic Minority: The Case of Chinese American Lesbians, Gay Men, and Bisexual People’ in Anthony R. D’Augelli and Charlotte J. Patterson (eds), *Lesbian, Gay and Bisexual Identities Over the Lifespan* (OUP, 1995) 89–90. See also, Wah-shan Chou, *Tongzhi: Politics of same-sex eroticism in Chinese societies* (Haworth Press, 2000).

living in the UK were they exposed to the framework and able to utilise it, to varying degrees, to pursue their claims for asylum protection. This has significant implications for the viability of Western-centric notions of sexual identity in the asylum context.

The problematic nature of Western conceptions of sexual identity was identified within the investigation. ‘Openness’ is used not only to identify the degree of risk, but it also implies that ‘openness’ is the standard for the lives of happy, congruent LGB identities (Chapter three).<sup>18</sup> Without expressly wishing to live openly, LGB people cannot access protection. Additionally, LGB identities are determined to be ‘immutable’, i.e., fixed and discovered. The system denies sexual fluidity and the difficulty of developing harmonious sexual identities within oppressive environments. As the empirical data highlighted, the process of identity development continued during the asylum process and after, once safety has been secured through receiving refugee status. Moreover, stereotypes of ‘correct’ LGB expression and behaviour persisted in credibility analyses, despite the issue having been addressed on repeated occasions by training and guidance (Chapter four). Undoubtedly, this is because the understandings within the system of sexual diversity remain inadequate.

Using exclusive frameworks of sexual identity also lacks intersectional understanding. Decision-making fails to apprehend that both experiences of persecution and constructions of sexual identity depend on several other lenses, such as race, sex, gender and education. Even on issues of credibility, the failure to appreciate the way that a person’s poverty, poor education or cultural pressures dictate their behaviour indicates an unwillingness or inability of decision-makers to understand how our actions and experiences are influenced by multiple identity categories.

The consequences of conducting single-axis analyses were clearly identified in this thesis. Bisexual claimants suffered erasure and marginalisation due to the dominance

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<sup>18</sup> Nicole Legate, Richard M. Ryan, and Netta Weinstein, ‘Is Coming Out Always a “Good Thing”?’ Exploring the Relations of Autonomy Support, Outness, and Wellness for Lesbian, Gay, and Bisexual Individuals’ 2012 3(2) Social Psychological and Personality Science 145-152.

and convenience of ‘monosexism’.<sup>19</sup> Furthermore, the experiences of lesbian and bisexual women were also erased for failing to mirror the experiences of their male counterparts. This is despite empirical data finding that lesbian and bisexual women asylum-seekers were more likely to suffer physical persecution, psychological harm, and rejection of their claims. Within asylum-producing societies, men and women often occupy different spaces, leading to non-identical experiences of maltreatment. This also relates to the role of socio-economic factors and other privileges, which enables more men to be *sur place* refugees than women.<sup>20</sup> By conducting determinations without knowledge informed by intersectionality, the lived realities of LGB identities are disbelieved and rejected, to the detriment of their safety.

The second concluding argument of this investigation explains the consequences of these problems for sexual minority asylum-seekers.

### 3. Sexual Minority Asylum-Seekers are Forced to Navigate the Asylum Process in Ways Prejudicial to their Dignity and Integrity

The British asylum system’s failure to understand the complexity, diversity and intersectionality of sexual identity forces LGB asylum-seekers to navigate the asylum process in ways that prejudice their fundamental rights. Most clearly, this concerns their dignity and integrity. Fair treatment is indelibly tied to the dignity of the individual (Chapter two). The failure to broaden understandings of sexual identity through a diverse and intersectional lens is unfair for several reasons. Most importantly, however, it is unfair because LGB claimants are forced to take certain steps that violate their dignity. As claimants relying on other Convention grounds are not led to take these steps, the differential nature of the LGB asylum experience is also discriminatory.

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<sup>19</sup> Kenji Yoshino, ‘Covering’ (2002) 111 Yale Law Journal 769-939, 849-864; ‘The Epistemic Contract of Bisexual Erasure’ (2000) 52 Stanford Law Review 353-46, 362 and 405.

<sup>20</sup> Jacqueline Bhabha, ‘Demography and Rights: Women, Children and Access to Asylum’ (2004) 16(2) International Journal of Refugee Law 227-243, 232-234.

This is exemplified by the emphasis placed upon verifying the claimant's sexual identity under the first step of Lord Rodger's five-stage test from *HJ (Iran)*. It is understandable, logical even, that a decision-maker queries whether a claimant truly holds the identity motivating one's claim for refugee protection, regardless of the Convention grounds. In the area of sexual identity, however, this has a special vociferousness. One must underscore the unique way in which this question is used to disbelieve the sexual identity of LGB claimants and reject their claims. The refusal culture of the Home Office is adaptable; although the UKSC dismantled the denial of claims through the obligation on applicants to act discreetly to avoid persecution, the first step of Lord Rodger's test enabled a shift of focus towards denying claims by the disbelief of a claimant's identity.<sup>21</sup> The empirical data underscored that the pervasiveness of the 'culture of disbelief' in UK decision-making is exemplified by the shifting battleground for ensuring that LGB asylum claims are treated fairly.

The disbelief in LGB claims regarding the validity of the claimed sexual identity is most clearly manifested within the evidentiary thresholds. The importance of evidence in sexual identity claims is understandable; sexual identity is a characteristic that cannot be identified in the ways that religion, nationality or ethnicity may have certain methods of verification. When disbelief enters the application of the evidentiary burdens, however, it is extremely problematic. The failure to 'prove' or to convince a decision-maker of one's sexuality, through documentary and narrative evidence, is synonymous with failing to comply with stringent notions of sexual identity. The evidentiary burden, therefore, is inextricably tied to the way that disbelief also allows or encourages decision-makers to restrict and essentialise the scope of 'legitimate' sexual identities.

First, to present an identity that is recognisable to the decision-maker and considered genuine and, thus, worthy of protection claimants must 'standardise' and simplify their identities. The asylum system is complicit in the 'violence' of claimants having to erase and deny the aspects of their identity that a decision-maker chooses not to

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<sup>21</sup> Jenni Millbank, 'From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom' (2009) 13 (2-3) *The International Journal of Human Rights* 391-414.



recognise.<sup>22</sup> This is anti-intersectional, as it pushes essentialised, single-axis sexual identities over those formed through multiple identity affiliations.<sup>23</sup> LGB claimants must present narratives involving past heterosexual relationships or marriages at their peril. They must ensure that their self-identification as a sexual minority involves the ‘LGBT’ framework, or risk seeing their claims denied, even if this identity construction has been alien to them for their entire lives. They must show conflict in their identities as a decision-maker deems is ‘authentic’, namely, on the intersection of their religious and sexual identities. The irony is, however, that claimants become desperate participants of the violence against them, by advancing the supremacy of their sexual identities, and by validating and legitimising the decision-makers’ approaches towards the RSD. There is no real choice in the matter; should they fail to do so, protection is denied.

The empirical data demonstrated that this was more than a conceptual argument. FASY005, a Ugandan national, pursued her claim as a lesbian, although she actually identified as bisexual, willingly simplifying her identity for the asylum process. More broadly, the empirical data also identified the way in which claimants were forced to navigate the expression of their identities in ways that were recognisable to the decision-maker, such as through the pursuit of relationships.

Indeed, claimants must document their self-expression in ways mandated by decision-makers, such as by visiting LGBT bars and clubs, consuming LGBT culture and literature, seeking support from LGBT organisations, and pursuing romantic relationships, as the asylum-seeker participants of the empirical data highlighted. Within the empirical data, legal representatives and support workers explained that there exists little capacity, little space to acknowledge that a claimant may still be traumatised from experiences in their home society, preventing them from expressing their sexual identities in the UK freely. The role of the home society in hindering a claimant’s ability to present a fully harmonious identity is given little consideration, unless explicitly raised by the legal representative. Regardless of the genuine and authentic nature of the identity and the associated expressions, the LGB claimant must

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<sup>22</sup> Hinger (n 8) 390.

<sup>23</sup> Phillips and Stewart (n 4) 380.

assimilate in order to succeed. Through these interviews, the empirical data also provided an unexpected insight into how legal representatives were forced to recognise the limited basis of understanding within the Home Office and take the necessary steps to guide claimants towards successful refugee claims.

Secondly, LGB claimants must accept, to the detriment of their integrity and dignity, the sexualisation of their identities. The pervasive nature of this sexualisation, which permeates all stages of the asylum process, from interview to determination, was revealed through the empirical data. Although there are examples of good practice, decision-makers largely acted on the conviction that scrutinising a claimant's sexual expression is necessary when deliberating over the truth of his or her identity. As a result, claimants must contend with the sexualisation of their narratives in some shape or form. For some, it has taken the form of sexualised questioning at the interview stage, as experienced by MASY002 and MASY003, for example. These claimants were asked explicit and demeaning questions about their sex lives, in some cases providing detailed and unnecessary information about individual sex acts. Claimants are compelled to cooperate with these questions due to the power imbalance of the interviewer-interviewee relationship, fearing that non-cooperation could provide the grounds for denying protection. For example, MASY008 explicitly stated that he did not wish to answer such questions, but felt that he had no choice in the matter. This is an abuse of power, against which accountability through fairness is the only remedy.

Where intrusive questioning lacks such explicitness, sexualisation still essentialises sexual identity. It focuses on the idea that the 'true' expression of sexual identity is through relationships, engendering intrusive questioning on previous and current relationships. Using relationships as a standard for genuine LGB identities is problematic. In an anecdotal example, a Libyan lesbian was asked about her former relationships. She explained her inability to initiate or maintain a romantic or sexual relationship because she was only able to leave the home with a male guardian. The Home Office interviewer's response to this was, 'so then how did you know that you were a lesbian', thereby highlighting the regressive logic that informs decision-maker questioning.

It is important to explain that other cultural issues facilitate the sexualisation of identities. Decision-makers face increasing pressures to meet their case resolution targets. Thus, disbelief and the reduced time available for an RSD combine to encourage decision-makers to ‘standardise’ sexual identity, resulting in sexualisation. For example, relationships provide time-constricted decision-makers with an easy, ‘efficient’ topic for verifying a claimant’s sexual identity, as sexual or romantic relationships take place in most cultures and sexualities. Yet, such an analysis, when utilised restrictively or exclusively, can deprive claimants of protection. For example, where a claimant cannot provide important details about their partners, such as names and ages, they fall to be disbelieved as lacking in credibility. Thus, essentialised notions of sexuality are inconsistent with sexual (and relationship) diversity. Decision-makers require the opportunity to fully explore the identities of LGB claimants without being forced to essentialise them because of time constraints. The current pressures upon the decision-makers do not allow for this.

The empirical data provided insight into the how the combination of disbelief and sexualisation manifested itself within practical decision-making, with respect of the credibility assessments of documentary and narrative evidence. Decision-makers expected documentary evidence (of stereotypical expressions) to corroborate LGB identities, without understanding the ways that poverty, trauma and racism can inhibit the production of such evidence. Although the guidance of the Home Office now prevents decision-makers from accepting sexually explicit evidence, during the period of this investigation decision-makers often accepted, and even encouraged, its submission. This would be inconceivable in claims based on any other Convention grounds. Many claimants do not know any better. Where LGB claimants see others providing such evidence and obtaining refugee status in a matter of a few weeks, they are desperate enough to believe these steps are necessary to surmount the prevailing ‘culture of disbelief’ in the Home Office. This fuels the proliferation of sexually explicit evidence. Consequently, claimants often place themselves in harmful environments, making exploitative deals with people to gain evidence that they perceive necessary.

Therefore, it is clear that far from resolving the issue of fairness in the sexual identity-based asylum context, the UKSC decision in *HJ (Iran)* has merely facilitated the

shifting ground: it is not the issue of discretion that is the most important, but whether and how a claimant's identity can be rejected. As a result of the disbelief embedded in RSDs, LGB asylum-seekers must compromise with their integrity and dignity in order to surmount the system's evidentiary standards. This is unacceptable from a legal and fairness perspective.

Having characterised the experiences of LGB asylum-seekers, it is important to forge a connection between the issues in LGB asylum decision-making and the problems with the British asylum system overall.

#### 4. The Problems with Sexual Identity-Based Asylum Claims are Symptomatic of Problems within the British Asylum System Overall

This investigation found numerous issues with the treatment of LGB asylum claims, which have been summarised in the preceding two arguments. It is essential, however, to place many of the problems regarding sexual identity-based asylum claims within the context of the British asylum system overall. This is because certain key criticisms in this investigation regarding the LGB asylum experience are relevant to the treatment of claims based on other Convention grounds. On the many problems shared by LGB and non-LGB claimants, the empirical data drove the appreciation of such parallels.

LGB claimants can experience issues uniquely, but often, the issues themselves are not unique to the sexual identity context. LGB claimants can be impacted uniquely by unfair treatment for three reasons: first, minority sexual identities are complex, secondly, there is a poor understanding of sexual diversity amongst officials and decision-makers, and thirdly, many of the issues faced by all asylum-seekers can have distinct consequences for LGB claimants. The argument that poor decision-making in LGB claims can be better understood by exploring the problems with the asylum system overall is evidenced here. It is conducted by a comparison of the unfair

treatment of LGB and non-LGB claims, and by appreciating the distinct experiences of LGB asylum-seekers within them.

The first point of comparison exists on the ‘culture of disbelief’. This thesis has examined the operation of the ‘culture of disbelief’ in the sexual identity context. It found that disbelief was a structured part of the determination of LGB claims, due to *HJ (Iran)*’s guidance on determining such claims. The empirical data provided detail on how the ‘culture of disbelief’ manifested itself within the decision-making on LGB claims. This has been explored above in relation to stringent credibility assessments of narrative and documentary evidence. Too often, claimant’s sexual identities were outright rejected due to inconsistencies in their narrative, or the inability to meet the evidentiary burden through supporting documentation.

The tools used to disbelieve claims are similar, but in the LGB context, the difficulty of ascertaining the truth of a claimant’s sexuality has allowed a particularly onerous burden to be a structured and approved part of decision-making. The identification by academics, legal representatives and support workers within the empirical data that the entire asylum system operates within a broader ‘culture of disbelief’ is important. This is supported by research documenting how the British asylum system approaches claims with disbelief, or a culture of outright denial.<sup>24</sup> Such research identifies that disbelief within non-LGB claims manifests itself through identical issues, such as stringent evidentiary burdens. By way of example, Trueman examined the asylum claims of 200 Ethiopian asylum-seekers, finding that the British asylum system sought to discredit such claims through poor credibility findings.<sup>25</sup> He concluded similarly that the ‘culture of disbelief’ was inhibiting the fair determination of these asylum claims. Thus, acknowledging the existence of a ‘culture of disbelief’ within the entire system is an important part of finding solutions to address the fairness of RSDs in LGB and non-LGB claims.

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<sup>24</sup> Jessica Anderson et al., ‘The Culture of Disbelief: An Ethnographic Approach to Understanding an Under-Theorised Concept in the UK Asylum System’ (July 2014) Refugee Studies Centre, Working Paper Series No. 102; James Souter, ‘A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom’ (2002) 1(1) Oxford Monitor of Forced Migration 48-59.

<sup>25</sup> Trevor Trueman, ‘Reasons for Refusal: an Audit of 200 Refusals of Ethiopian Asylum Seekers in England’ (2009) 23(3) Journal of Immigration, Asylum and Nationality Law 281-308, 281.

Secondly, the recruitment, skills and training of Home Office personnel also affect all asylum claims made under the British system. Recognising that these issues cut across the experiences of asylum-seekers on all grounds of claim was driven first by the structural principles, which explored and advanced the need for good quality training and recruitment standards. The empirical data provided further clarity on these overarching issues, through the Freedom of Information requests and the interview with a former decision-maker of the Home Office. Although only limited information was available for the purposes of this thesis on the recruitment procedure, the data found that the Home Office did not appear to adhere to the UNHCR's standards.<sup>26</sup> Within the empirical data, the experiences of the former Home Office decision-maker appeared to confirm this. Additionally, a basic internet search of the Home Office's more recent recruitment efforts revealed that these standards have not improved (Chapter four). Applicants without university degrees or asylum-specific work experience were recruited for decision-maker roles.<sup>27</sup> These findings are important. Although they require further exploration outside this thesis, they suggest that the Home Office is not adhering to the recruitment standards espoused by the UNHCR. Accordingly, the Home Office is inadvertently facilitating poor quality RSDs made by decision-makers who lack the necessary qualifications, experience and motivation. As decision-makers are not recruited to work on specific grounds of claim, this issue is worrying for LGB and non-LGB asylum-seekers alike.

On the issue of training, the empirical data provided awareness of its overall decline. The initial period of foundational training for all new decision-makers was subject to a decline in length and presumably quality, reduced from over 60 days to 25 days. In the LGB context, a full-day course of training on LGB issues was reduced to a half-day and integrated into the main body of the foundational training for decision-makers. Outside of the foundation training, the LGB training could be repeated, but dangerously, this was at the discretion of the decision-maker.

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<sup>26</sup> UNHCR, 'Quality Initiative Project: A UNHCR review of the UK Home Office Refugee Status Determination Procedures' (2005-2009).

<sup>27</sup> Home Office, 'Higher Executive Officer (HEO) Case Owner & Presenting Officer (Job Advertisement)' (*jobsgopublic*, May-June 2014) <<http://www.jobsgopublic.com/job/higher-executive-officer-heo-case-owner-presenting-officer-n-a/rss>> accessed 15 November 2015.

It is important to make some distinctions on the issue of training. This thesis contends that the decline in the quality of training has had a significant impact upon the ability of decision-makers to conduct their decision-making fairly. Indeed, this investigation found that too often decision-makers made inadequate evaluations because the RSD involves complex legal processes for which they lack the skills. For example, decision-makers consistently applied the evidentiary standards of the RSD stringently.

COI provides another concrete example of how both of these training sessions reflect poorly upon the skills of the decision-makers. This investigation found decision-makers appeared to have insufficient skills for interpreting COI and making decisions on internal relocation, especially where information was scarce, undetailed or outdated, or where contexts were in flux (Chapter three). Decision-makers contradicted the guidance, or they failed to cite COI or policy guidance altogether, making it difficult to hold them accountable to their mistakes. For example, decision-makers conducted segmented credibility assessments, despite the guidance to consider the relevant factors in a single test. As these issues have also been identified in the investigation of the British system's overall decision-making, this thesis contends that the decline in the quality of the initial training period has affected the decision-making in LGB and other claims alike.<sup>28</sup> The complexity of these issues may be even more heightened in the LGB context, due to changing societies, the implicit politicisation of COI, and issues with the fitness and availability of information for asylum purposes. The actual deficiencies of decision-making, nevertheless, are not unique.

Through the lens of MASY005's refusal letter, the empirical data evidenced the insufficient nature of the decision-maker's analysis of developing states. In the case of India, MASY005's home society, the decision-maker's assertion that there was no risk of persecution arguably relies on political assumptions based on the state's advancing economy and the perception that large metropolises are wholly liberal. Furthermore, the unclear legal status of the law criminalising homosexuality allowed

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<sup>28</sup> Independent Chief Inspector of the UK Border Agency, 'The Use of Country of Origin Information in Deciding Asylum Applications: A Thematic Inspection' (October 2010 - May 2011) 12-31.

the decision-maker to conduct a superficial analysis that ignored the reality on the ground. This thesis fears that the decision-maker did not have the skills required for such a difficult task.

Furthermore, as the training on LGB issues has also declined, this has a separate impact on decision-making in sexual identity-based asylum claims. The empirical data emphasises the necessary connection between the aforementioned poor understanding of sexual identity and poor standards of training. A specific example of this is the return and persistence of stereotypes regarding LGB identities that practitioners and activists assumed to be eradicated. Aside from the ignorance regarding sexual identity discussed above, examples of such stereotyping relate to claimants' former opposite sex relationships and children, aspects of LGB lives deemed inconsistent with their identities. Thus, the poor foundation training impacts the quality of decision-making on all grounds, but the poor LGB training impacts issues such as the difficulties with COI and the understanding of sexual identity. This highlights how and why the LGB experience of the British asylum system can be so acutely prejudicial.

The third point of comparison is with regard to reception conditions. Issues regarding the reception of LGB asylum-seekers are also better understood by placing them in broader context of the role that they play within the British asylum system. This investigation found detention to be an integral component of the British system, with current or former asylum-seekers formulating the majority of detainees (Chapter four). The fairness of immigration detention and its operation has been subject to substantial criticisms.<sup>29</sup> Such criticisms also outlined how many of the problems faced by detainee asylum-seekers were experienced regardless of the ground of claim, such the impact of detention as an aggressor of mental health. Moreover, LGB and non-LGB claimants alike have been subjected to the DFT procedure, whose speed, efficiency and ability to control asylum-seekers has been prioritised over its impact on the fundamental rights of claimants.<sup>30</sup>

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<sup>29</sup> Detention Action, 'The State of Detention: Immigration Detention in the UK in 2014' (October 2014) 3.

<sup>30</sup> *ibid* 21; *Lord Chancellor v. Secretary of State for the Home Department* [2015] EWCA Civ 840 [49].



Once again, these issues are important across all refugee claims, but their impact in the LGB context is separate. On reception matters, the empirical data did not elucidate the comparison, but provided insight into the nefarious nature of detention and DFT in the LGB context, as discussed earlier. LGB claimants were disproportionately subjected to such procedures in comparison to other claimants. This lacked real understanding regarding the exact consequences for LGB claimants regarding their safety in detention, and the impact of truncated time constraints upon their claims (Chapter four). As LGB claimants appeared to be disproportionately subjected to detention and DFT, understanding its impact is critical. Thus, once again, whilst reception issues are noted in all claims, the experience of LGB claimants contains important nuances.

The fourth comparison is also tied to the issue of reception, specifically, the role of the legal representative. The empirical data highlighted that on matters of both substantive and procedural fairness, the declining standards of decision-making and the omnipresence of disbelief heightened the role of legal representatives. For example, legal representatives were forced to invest time in preparing narrative evidence as a way of setting up the claimant's credibility (Chapter three). Representatives were also forced to preempt the tendency of the Home Office to detain asylum-seekers at the screening interview, by submitting representations regarding the claimant's unfitness for detention (Chapter four). Research into the impact of detention and DFT found that they had implications for access to one's legal representative and the receipt of quality representation (Chapter four).

Indeed, the empirical data discussed the increasing pressures placed upon all legal representatives in the light of changes to the British asylum system, such as legal aid contracts for certain firms to represent asylum-seeker detainees ('detention contracts'). The empirical data also provided greater insight into how LGB asylum-seekers suffered under this changing regime, and how practitioners faced increasing pressures too. For example, LGB detainees were willing to wait several months for a representative experienced in sexual identity-based asylum claims than accept a poorer alternative. Thus, the empirical data has highlighted that in the LGB context, the issue is not simply about access to legal representation, but the ability to instruct

representatives that understand sexual identity and know how to present corresponding asylum claims. Moreover, it highlighted that distortion of the evidentiary standards by decision-makers forced representatives to take unethical or inappropriate steps to secure their clients protection. The critical impact of a legal representative upon the outcome of a claim is documented in Chapter one and throughout Chapters three and four. It is fundamental to all claims, but in an LGB claim, representation by somebody ignorant of the relevant issues can be even more detrimental to its outcome.

The final comparison concerns the system's general disregard for medical factors, particularly psychological harm. This is an extremely multidimensional issue, encompassing concerns regarding the ignorance of the mental health impact of detention; the inadequate provision of healthcare offered to detainees; overlooking how memory impacts on the presentation of a consistent and detailed identity narrative; the failure to consider the incidence of psychological violence; and undermining the content of medical reports. By exploring the impact of these issues upon LGB asylum-seekers, the thesis has referenced research that looked at overall decision-making, not that specific to the LGB context (Chapter four). Furthermore, the newspaper reports discussed in Chapter four regarding the quality of healthcare within detention also reference asylum-seekers generally. The nuance provided by the empirical data concerns how LGB asylum-seekers, particularly lesbians and bisexual women, experience high incidences of psychological harm. Surely this relates to the way that LGB asylum-seekers live in oppressive societies, where they must suppress their sexualities to ensure their physical safety, at mental and emotional cost. The high incidence of psychological harm amongst sexual minority women speaks again to the way that their expression is often limited to the private domain and they are less likely to be *sur place* refugees than their male counterparts. Thereupon, although the Home Office's disregard for medical factors relating to physical and mental health exists in all claims, this investigation has found them to be especially significant (in terms of their incidence) within the sexual identity context.

From this we learn that the entire British asylum system has serious issues with fairness, not just from the perspective of LGB claims. Each of these issues engages with the structural principles. By comparing the poor treatment of LGB claims and

all other grounds of claim, we obtain a deeper insight into the fairness of the asylum system overall. This is necessary to grasp the enormity of the task of improving the system. It appears, however, that although there are issues with substantive fairness in all claims, e.g. relating to evidentiary standards, points of comparison also relate mostly to procedural fairness. Indeed, this section has identified common problems to do with partiality, recruitment, training, reception, healthcare and legal representation. Given the aforementioned need for higher standards of procedural fairness, the comparison highlights the true scale of the problems embedded within the British asylum system. Whilst LGB claimants have unique experiences and needs with regard to procedural fairness, arguably the issues of substantive and procedural fairness in LGB decision-making are caused by misconceptions surrounding the lived reality of sexual identity – which are obviously absent from non-LGB cases. The way that LGB decision-making often has an additionally prejudicial dimension is exemplified when using evidentiary standards as a lens. Evidentiary standards relate in all cases to the way a claimant is considered to be credible, and deserving of protection. This is the crux of the entire asylum determination. The problems with credibility assessments in the British system overall have been well documented. In the LGB context, however, the credibility process has greater voraciousness, for the fact that disbelief of a claimant's sexuality is embedded into the structure of these claims and allows decision-makers to rely upon outdated notions of sexual identity.

Having explained that many problems faced by LGB asylum-seekers are symptomatic of deficiencies in the British asylum system across Convention grounds, the final section advances some thoughts on how the fair treatment of LGB decision-making might be improved.

## 5. Final Thoughts on the Mistreatment of LGB Asylum-Seekers

During the process of conducting this investigation and writing the resulting thesis, it became clear that the persecution of LGB individuals in their countries of origin and their unfair treatment within the British asylum system are tied together by a central issue: gender. Indeed, our treatment of sexual minorities essentially concerns how

we, as a society, impose gender expression and identity onto people. This is particularly acute within the law and its implementation. Many theorists have addressed the complex relationship between gender, sexuality and societal (and legal) attitudes. Law, for example, asserts that state and societal intolerance towards sexual minorities is not a reaction to their sexual practices.<sup>31</sup> Through the expression of their sexualities, LGB individuals violate the sanctity of normative gender roles accepted within society, and reinforced by culture, legal provisions and religion. In Law's opinion, the 'contempt' for LGB people that is present within many societies only strengthens the 'social meaning of gender', i.e., the argument that gender norms are entirely socially constructed to serve their own ends and purposes.<sup>32</sup>

Valentine concurs:

Heterosexuality is ideologically linked to the notion of gender identities (masculinity and femininity) because the notion of opposite-sex relationships presumes a binary distinction between what it means to be a man or a woman.<sup>33</sup>

As masculinity and femininity are perceived to be the natural expressions of heterosexual men and women, homosexuality is associated with gender inversion.<sup>34</sup> For this reason, Wilets describes how sexual minorities are treated as 'gender outlaws'.<sup>35</sup> They are subjected to violence for their failure to follow the heterosexual doctrine, i.e., that individuals should only engage in opposite-sex relationships and lead to the production of children, and that men and women should only express traits that are consistent with their narrative arcs of masculinity and femininity, respectively.<sup>36</sup>

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<sup>31</sup> Sylvia A Law, 'Homosexuality and the Social Meaning of Gender' (1988) Wis. L. Rev 187.

<sup>32</sup> *ibid* 187.

<sup>33</sup> Gill Valentine, '(Hetero)sexing Space: Lesbian Perceptions and Experiences of Everyday Spaces' (1993) 11 Environment and Planning D: Society and Space 395-413, 410.

<sup>34</sup> Gayle Rubin, 'Of Catamites and Kings: Reflections on Butch, Gender, and Boundaries' in Joan Nestle (ed), *The Persistent Desire: A Femme-Butch Reader* (Alyson Publications, 1992) 466-82.

<sup>35</sup> James D. Wilets, 'Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective' (1996) 60 Alb. L. Rev. 989, 991 and 1011.

<sup>36</sup> *ibid*.

The symbiotic relationship between law and society means that legal treatment only conveys societal attitudes towards gender roles. In asylum-producing states, this is evident from the existence of criminal sanctions against same-sex sexual acts. In asylum-receiving states too, the prescriptive nature of gender performance is reflected in the gradual recognition of LGB individuals as the subjects of rights and entitlements, as referenced throughout this thesis. This is why it is essential for decision-makers within the British asylum system to understand the critical role that gender plays in the lives of all LGB people, regardless of their sex. This understanding would enable claims to move away from their current focus on sex and behaviour, and move towards the non-conformity of the claimant's sexual identity with the prevailing cultural, political, religious and social attitudes of the home society.

Indeed, underpinning the RSD in LGB claims with gender is consistent with conducting intersectional decision-making. It is intersectionality that reveals, within the course of the asylum process, the societal attitudes that all claimants, most acutely LGB claimants, must face. It is intersectional analysis that has enabled this investigation to highlight that the British asylum system remains in the process of moving away from essentialised understandings of sexual identity that are also rooted in gender norms. Intersectional decision-making is fundamental; the implications of ignoring intersectionality are significant. Without intersectionality, simple, single-axis identities gain credence and privilege within their groups. Their experiences come to characterise the entire narrative of those particular categories. Such phenomena take place at the expense of individuals or sub-groups whose identities are more complex, relating to multiple identity categories.<sup>37</sup> Marginalising the intersectionally complex, Crenshaw argues, can only be described as discrimination (and those that engage in such marginalisation, discriminators).<sup>38</sup> Discriminators cannot be said to operate a system characterised by fairness, no matter how one may define fairness. This thought is particularly powerful in the context of the investigation conducted within this thesis.

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<sup>37</sup> Crenshaw, 'Demarginalizing the Intersection' (n 7) 140.

<sup>38</sup> *ibid* 150-151.

Therefore, intersectionality allows the focus on gender within LGB claims to be conducted with respect of understanding how the performance and experience of gender is shaped by one's race, culture, religion, sex and gender identity, for example. Accordingly, an intersectional, gender-focused analysis would hopefully move the RSD away from the shifting barriers that are placed against LGB claimants on the basis of essentialist tropes regarding LGB behaviour and identity. It could re-orient the RSD back to an assessment of the risk of harm posed to the claimant. Thus, better understanding the role that gender norms play in the lives of LGB asylum-seekers through the tools derived from intersectionality provides a potentially valuable opportunity for further research into the fair treatment of LGB claimants within the British asylum system. Such research would build upon the investigation conducted here.

## APPENDICES

### APPENDIX A

#### List of Participants within Empirical Research

Name/Code	Category	Details
FASY001	Asylum-seeker	Sex: Female Age: 26 Nationality: Gambia Religion: Muslim Marital Status: Undisclosed English Proficiency: Good
FASY002	Asylum-seeker	Sex: Female Age: 46 Nationality: Jamaica Religion: Christian Marital Status: Married English Proficiency: Good
FASY003	Asylum-seeker	Sex: Female Age: 39 Nationality: Pakistan Religion: Muslim Marital Status: Married English Proficiency: Poor
FASY004	Asylum-seeker	Sex: Female Age: 33 Nationality: Morocco Religion: Muslim Marital Status: Single English Proficiency: Good

FASY005	Asylum-seeker	Sex: Female Age: 33 Nationality: Uganda Religion: Christian Marital Status: Single English Proficiency: Good
FASY006	Asylum-seeker	Sex: Female Age: 29 Nationality: Saudi Arabia Religion: Muslim Marital Status: Divorced English Proficiency: Good
FASY007	Asylum-seeker	Sex: Female Age: 30-35 Nationality: Uganda Religion: Christian Marital Status: Single English Proficiency: Good
FASY008	Asylum-seeker	Sex: Female Age: 41 Nationality: Uganda Religion: Undisclosed Marital Status: Married English Proficiency: Good
FASY009	Asylum-seeker	Sex: Female Age: 20-25 Nationality: Nigeria Religion: Undisclosed Marital Status: Single English Proficiency: Good
FASY010	Asylum-seeker	Sex: Female Age: 36 Nationality: Pakistan



		Religion: Muslim Marital Status: Single English Proficiency: Good
MASY001	Asylum-seeker	Sex: Male Age: 40 Nationality: Guyana Religion: Undisclosed Marital Status: Single English Proficiency: Good
MASY002	Asylum-seeker	Sex: Male Age: 39 Nationality: Pakistan Religion: Muslim Marital Status: Single English Proficiency: Good
MASY003	Asylum-seeker	Sex: Male Age: 30-39 Nationality: Ghana Religion: Undisclosed Marital Status: Single English Proficiency: Good
MASY004	Asylum-seeker	Sex: Male Age: 40-49 Nationality: Burkina Faso Religion: Muslim Marital Status: Married English Proficiency: Poor
MASY005	Asylum-seeker	Sex: Male Age: 29 Nationality: India Religion: Muslim Marital Status: Single English Proficiency: Good

MASY006	Asylum-seeker	Sex: Male Age: 23 Nationality: Pakistan Religion: Muslim Marital Status: Single English Proficiency: Good
MASY007	Asylum-seeker	Sex: Male Age: 24 Nationality: Pakistan Religion: Muslim Marital Status: Single English Proficiency: Good
MASY008	Asylum-seeker	Sex: Male Age: 30-39 Nationality: Jamaica Religion: Undisclosed Marital Status: Single English Proficiency: Good
MASY009	Asylum-seeker	Sex: Male Age: 20-25 Nationality: Bangladesh Religion: Muslim Marital Status: Single English Proficiency: Good
MASY010	Asylum-seeker	Sex: Male Age: 45 Nationality: Egypt Religion: Muslim Marital Status: Divorced English Proficiency: Good
Professional Participant A	‘Professional’ (NGO Employee)	Support Worker for British NGO

Liz Barratt	‘Professional’ (Practitioner)	Solicitor and Partner at Bindmans PLC
S. Chelvan	‘Professional’ (Practitioner)	Barrister at Law at No5 Chambers
Joël Le Déroff	‘Professional’ (Lobbyist on LGBTI asylum issues)	(Former) Senior Policy and Programmes Officer at International Lesbian and Gay Association (ILGA- Europe)
Paul Dillane	‘Professional’ (Former Practitioner and COI specialist)	(Former) Refugee Specialist at Amnesty International UK, now Executive Director at UKLGIG
Barry O’Leary	‘Professional’ (Practitioner)	Solicitor and Partner at Wesley Gryk Solicitors
Erin Power	‘Professional’ (Support and Advocacy)	(Former) Executive Director at UKLGIG
Catherine Robinson	‘Professional’ (Practitioner)	Former Solicitor, now Barrister at Law at 1 Pump Court Chambers
Lilian Tsourdi	‘Professional’ (Academic)	PhD Candidate at Université Libre de Bruxelles
Robert Wintemute	‘Professional’ (Academic)	Professor of Human Rights at King’s College London
Anonymous (referred to as ‘Former Home Office decision-maker’)	Decision-maker	Former Home Office caseworker and caseowner

## Timeline of Empirical Research

Date	Work	Other Details
22.01.2013	Application for Ethical approval submitted.	
05.03.2013	Ethical approval granted.	Ref: SLSJPhd1213/05
28.03.2013	Submitted first Freedom of Information request to the Home Office.	
10.04.2013	Interviewed Robert Wintemute.	Location: London Category: Professional Profession: Professor of Human Rights Law, King's College London
11.04.2013	Interviewed Barry O'Leary.	Location: London Category: Professional Profession: Solicitor, Wesley Gryk Solicitors
11.04.2013	Interviewed Erin Power.	Location: London Category: Professional Profession: Executive Director of UKLGIG
11.04.2013	Interviewed Professional Participant A.	Location: London Category: Professional Profession: Support Worker with NGO
12.04.2013	Interviewed Paul Dillane.	Location: London Category: Professional Profession: Refugee Researcher, Amnesty International (UK)
15.05.2013	Interviewed Joël Le Déroff.	Location: Brussels Category: Professional

		Profession: Senior Policy and Programmes Officer, ILGA-Europe
15.05.2013	Interviewed Lilian Tsourdi.	Location: Brussels Category: Professional Profession: PhD Candidate and Researcher, Université Libre de Bruxelles
16.05.2013	Interviewed S. Chelvan.	Location: London Category: Professional Profession: Barrister, No 5 Chambers
17.05.2013	Interviewed Liz Barratt.	Location: London Category: Professional Profession: Solicitor, Bindmans LLP
17.05.2013	Interviewed Catherine Robinson.	Location: London Category: Professional Profession: Barrister, 1 Pump Court Chambers
12.06.2013	Interviewed MASY001.	Category: Asylum-seeker Sex: Male Nationality: Guyana
04.07.2013	Application sent for request for access to interview members of Judiciary.	
16.07.2013	Interviewed MASY002.	Category: Asylum-seeker Sex: Male Nationality: Pakistan

23.07.2013	Interviewed FASY001.	Category: Asylum-seeker Sex: Female Nationality: Gambia
24.07.2013	Interviewed former Home Office caseworker.	Location: Liverpool Category: Decision-maker
01.08.2013	Interviewed MASY003.	Category: Asylum-seeker Sex: Male Nationality: Ghana
01.08.2013	Interviewed MASY004.	Category: Asylum-seeker Sex: Male Nationality: Burkina Faso
14.08.2013	Received response to application for Judiciary access with request for more information.	(Letter from representative of the Judiciary).
18.09.2013	Interviewed MASY005.	Category: Asylum-seeker Sex: Male Nationality: India
18.09.2013	Interviewed MASY006.	Category: Asylum-seeker Sex: Male Nationality: Pakistan
18.09.2013	Interviewed MASY007.	Category: Asylum-seeker Sex: Male Nationality: Pakistan
09.10.2013	Received response to Freedom of Information Request.	FOI Request 27021.
16.10.2013	Responded to questions about research regarding application for Judiciary access.	Letter was dated 05.10.2013, but sent on 16.10.2013. No response received to this correspondence.
11.01.2014	Interviewed MASY008.	Category: Asylum-seeker

		Sex: Male Nationality: Jamaica
23.01.2014	Interviewed FASY002.	Category: Asylum-seeker Sex: Female Nationality: Jamaica
23.01.2014	Interviewed MASY009.	Category: Asylum-seeker Sex: Male Nationality: Bangladesh
23.01.2014	Interviewed FASY003.	Category: Asylum-seeker Sex: Female Nationality: Pakistani
06.05.2014	Submitted second Freedom of Information Request to Home Office.	
13.06.2014	Received response to second Freedom of Information Request.	FOI Request 31669.
05.09.2014	Interviewed MASY010.	Category: Asylum-seeker Sex: Male Nationality: Egypt
08.09.2014	Interviewed FASY004.	Category: Asylum-seeker Sex: Female Nationality: Morocco
09.09.2014	Interviewed FASY005.	Category: Asylum-seeker Sex: Female Nationality: Uganda
09.09.2014	Interviewed FASY006.	Category: Asylum-seeker Sex: Female Nationality: Saudi Arabia
10.09.2014	Interviewed FASY007.	Category: Asylum-seeker Sex: Female Nationality: Uganda
23.09.2014	Interviewed FASY008.	Category: Asylum-seeker

		Sex: Female Nationality: Uganda
02.10.2014	Interviewed FASY009.	Category: Asylum-seeker Sex: Female Nationality: Nigeria
17.10.2014	Interviewed FASY010.	Category: Asylum-seeker Sex: Female Nationality: Pakistan
01.02.2014 – 13.03.2016	Obtained written consent from Professionals to be attributed to their quotes.	



## Participant Information Sheet and Consent Form



*“Re-thinking the British asylum model: is the system of asylum protection operated in the UK fair to lesbian, gay and bisexual applicants?”*

### **Participant Information Sheet**

You are being invited to take part in a research study as part of a PhD research project on the effectiveness of the British asylum system in protecting individuals claiming asylum on grounds of their sexual orientation. Before you decide whether to accept or decline this invitation, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Please ask if there is anything that is not clear or if you would like more information. Thank you for reading this.

#### **Who will conduct the research?**

Tawseef Khan  
School of Law and Social Justice  
University of Liverpool  
Liverpool, L69 3BX

#### **Title of the Research**

*“Re-thinking the British asylum model: is the system of asylum protection operated in the UK fair to lesbian, gay and bisexual applicants?”*

#### **1. What is the aim of the research?**

The aim of this research is to explore the opinions and experiences of the various groups of people involved within the asylum process for lesbian, gay and bisexual (LGB) refugees – e.g. asylum seekers, activists, legal experts and decision-makers. By interviewing them about their experiences, a better understanding is desired, of how these different groups feel about the current state of the British asylum system for LGB claimants. These interviews are part of a PhD project exploring the ideal asylum system for LGB claimants.

#### **2. Why have you been chosen to participate?**

There are a number of different groups that have been chosen to participate in the research. This is so that the views and experiences of all the relevant groups can be included, to produce a research project that is balanced and unbiased. As a member of the groups identified above, your experiences are valued highly, in the belief that they will contribute positively to the research.

### **3. What would you be asked to do if you took part?**

You will be asked to participate in an interview, which should take no more than 90 minutes to complete. The interview will take the format of a series of questions, which you are requested to answer as fully as possible – the list of questions will be available for you to look through at the beginning of the interview. The interview will cover your experiences of the asylum process, your thoughts on how the process impacts upon LGB asylum seekers.

If you have undergone traumatic experiences, there is the risk that the interview could bring to the surface feelings of pain and discomfort, associated with a recollection and re-examination of very personal and painful circumstances that you had perhaps forgotten. Please remember that you will not be pressurised to answer any questions that you do not wish and regular breaks can be taken during the interview process.

### **4. What happens to the data collected?**

The interviews will be audio recorded and then converted into hand-typed transcripts. Where the interviews have been conducted in a language other than English, these will be translated into English. The transcripts will be analysed and considered with regard to the various issues within the British asylum process for LGB refugees.

### **5. How is confidentiality maintained?**

The confidentiality of all participants will be secured. All interview transcripts and resulting analysis will be kept anonymous, so that no interviewee can be identified by anything other than his/her gender, sexuality, country of origin and age. All data will be encrypted. The audiotapes, transcripts, paper files and all digital data will be destroyed within 12 months of the award of the PhD.

### **6. What happens if you do not want to take part or if I change my mind?**

Participation is optional. If you agree to participate you will be given this information sheet to keep and be asked to sign a consent form. You will be free to withdraw at any time without giving a reason and without detriment to yourself.

### **7. Will I be paid for participating in the research?**

Unfortunately, there are no resources available to pay for your participation.

### **8. What is the duration of the research?**

The research will consist of one interview that will last for a maximum of 90 minutes.

### **9. Where will the research be conducted?**

The interview will take place at a mutually agreed location. This is most likely to be at the office of the organisation through which you have been contacted.

### **10. Will the outcomes of the research be published?**

The outcome of the research will only be published in the form of the resulting PhD thesis and in related publications.

### **Contact for further information**

Tawseef.Khan@liverpool.ac.uk

## What if something goes wrong?

The following organisations provide free and/or low-cost counselling for LGB people:

### **GMI Partnership**

(Consists of Positive East, the Metro Centre and West London's Gay Men's Project)

Tel: 020 7160 0941

Email: [info@gmipartnership.co.uk](mailto:info@gmipartnership.co.uk)

### **London Friend**

Main Office:

London Friend

86 Caledonian Road

London

N1 9DN

**Tel:** 020 7833 1674

**Email:** [office@londonfriend.org.uk](mailto:office@londonfriend.org.uk)

**Nearest tube:** King's Cross

(There are other drop-in offices across London)

### **Pace Health**

34 Hartham Road

London

N7 9JL

**Tel:** 020 7700 1323

**Email:** [info@pacehealth.org.uk](mailto:info@pacehealth.org.uk)

**Nearest tube:** Holloway Road or Caledonian Road

### **Lesbian and Gay Foundation**

5 Richmond Street

Manchester

M1 3HF

**Tel:** 0845 330 3030

**Email:** [info@lgf.org.uk](mailto:info@lgf.org.uk)

### **Terrence Higgins Trust**

314-320 Gray's Inn Road

London

WC1X 8DP

**Tel:** 0808 802 1221 for an adviser or 020 7812 1600

**Email:** [info@tht.org.uk](mailto:info@tht.org.uk)

**Nearest tube:** King's Cross/St.Pancras

(Opening hours: 9.30am to 5.30pm Monday to Friday)

*“Re-thinking the British asylum model: is the system of asylum protection operated in the UK fair to lesbian, gay and bisexual applicants?”*

### CONSENT FORM

If you are happy to participate please complete and sign the consent form below

**Please initial box**

1. I confirm that I have read the attached information sheet on the above project and have had the opportunity to consider the information and ask questions and had these answered satisfactorily.
2. I understand that my participation in the study is voluntary and unpaid and that I am free to withdraw at any time without giving a reason and without detriment to any treatment/service.
3. I understand that the interviews will be audio-recorded and then transcribed (and translated into English, if applicable).
4. I agree to the use of anonymous quotes and publication of the results of this work.





I agree to take part in the above project

\_\_\_\_\_  
Name of participant

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name of person taking consent

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

## **Interview Schedule**

### **For Asylum Claimants**

#### **Pre-Interview**

1. When you first claimed asylum, did you receive any information on your rights?
2. Did you receive any literature in relation to these rights? What did it say?
3. How did you find your legal representative?
4. What were your experiences with your legal representative?
5. What was the process of claiming asylum like – i.e. in booking the appointment with the UK Border Agency for you to claim asylum/have your screening interview?
6. Was your application put into the fast-track system? Were you told why / why not?
7. When you were provided with NASS accommodation, what was this accommodation like? Were you given the option to state any preference in relation to the people with whom you would like to share accommodation?
8. Did you feel comfortable there? Explain why.
9. Did you get legal aid for the interview and appeal stages?

#### **Interview**

10. How would you describe the asylum screening interview process?
11. Were you asked if you wanted to have the interview tape recorded? Did you?
12. Were you asked if you preferred a male or female investigator? Was this choice honoured?
13. Did you use an interpreter?
14. Were you asked if you preferred a male or female interpreter? Was this choice honoured?
15. Was the interpreter from the same ethnic background and/or the same country as you?
16. Describe your experience with the interpreter?
17. How would you describe the interviewer? Did you feel comfortable around them?
18. What kinds of questions were you asked? How did you feel about the way these were asked? How did you feel about the topics they were asking you about?
19. Did you have any documentary evidence to submit in support of your claim? If not, why not? If yes, what was it?

#### **Decision and Appeal**

20. Was your asylum claim refused by the UK Border Agency? If so, do you remember/understand what their reasons were?
21. Did your case go to appeal?
22. What were your initial impressions of the Tribunal appeal?
23. How would you describe your experience with the interpreter at the Tribunal?
24. Did the HOPOU attend the tribunal?
25. What questions did /she ask?
26. How would you describe the Immigration Judge?
27. What kinds of questions did the Immigration Judge ask? How did you feel about these questions?

28. How did you feel about the topics that were covered in those questions?
29. What were the outcomes of the decision and appeal? Did you understand the reasons behind them?

### **Identity/Persecution**

30. Do you identify as 'LGB' or do you have a different understanding of your sexual orientation? How would you describe your sexual orientation?
31. What led you to coming to the UK to claim asylum?
32. Can you tell me about the nature/content of your asylum claim itself?
33. Were there elements of sexual violence involved in your claim?
34. Were any medical/psychological assessments made and reports submitted?
35. What were the findings of the medical/psychological reports?
36. Do you have any ongoing health conditions, as a direct result of the persecution you suffered in your country of origin i.e. mental health conditions such as depression or post-traumatic stress disorder?
37. Was the truthfulness of your account doubted by the UK Border Agency or Tribunal decision-makers? If yes, how did you feel about it? [or something related to credibility]
38. Did you at any point of the process feel that the decision-maker did not understand your cultural background? [or something related to cultural sensitiveness]

### **Conclusion**

39. What do you think of the asylum process as it currently stands?
40. If you could suggest improvements to the system, what would they consist of?

### **For Professionals**

1. Could you tell about your experience in the area of sexual orientation based asylum? (*i.e. the nature of your experience and how long*)
2. Could you give a general overview of how, in your perception/opinion, the field of sexual orientation based asylum has developed over the years?
3. Historically, what have been the biggest problems with the system - and the most important solutions introduced to address them?
4. How would you appraise the current British asylum system for LGB asylum seekers?
5. What do you think are the greatest barriers to improving the system for LGB refugees?
6. What are your thoughts on the use of training for asylum interviewers and caseworkers to combat these issues? If in favour, what kind of training do you think is needed?
7. In your experience, how have investigators/interviewers handled the screening interview process in the LGB context?
8. What are your thoughts on the substantive interview stage, particularly the topics covered and interview style/technique?
9. How do you think LGB identity development is understood and treated by interviewers and decision-makers? If you could improve this understanding, what would you teach them?

10. More broadly speaking, do you think that the applicants' culture in their countries of origin is relevant to the asylum process? If so, how does it impact upon the process?
11. What do you think of how the UK Border Agency has interpreted the persecutory thresholds within this area, particularly in relation to the distinction between persecution and discrimination?
12. In order to best protect persecuted sexual minorities, how should 'Particular Social Group' be defined? Is it enough that LGB refugees can be processed through this asylum area?
13. What are your thoughts on the asylum appeal procedure?
14. How are Immigration Judges grappling with applying asylum concepts to an LGB context?
15. Do you know if there is training available for Immigration Judges on such topics? Do you think training is important/necessary for Judges in particular?
16. Are the principles of cases decided in the Appellate Courts quickly applied at the by Immigration Judges at the Tribunal level?
17. In your experience, how can interpreters and their own cultural perceptions/prejudices affect the dynamic of the substantive interview or appeal hearing?
18. What role do you think that evidence, in particular documentary evidence, should play within such claims?
19. How useful do you regard Country of Origin Information reports in this field?
20. What role do medical and other expert reports have to play within sexual orientation based asylum claims?
21. In conclusion, what positive and negative points would you raise to summarise your experience of the asylum system?
22. Are there any other issues within the LGB asylum decision-making process that you would like to highlight?
23. Are there any other issues that you think need to be addressed in terms of how they affect LGB refugees, despite the fact that they are not directly considered to be a part of the asylum process i.e. housing, legal aid, and financial support?

### **Questionnaire for the UK Border Agency**

#### **Training**

1. How are UKBA case-owners/decision-makers chosen? Are there any minimum education standards/eligibility criteria for the role?
2. What training do UKBA case-owners and decision-makers receive, in relation to sexual-orientation based asylum claims?
3. Does the training address the differing conceptions of LGB identity and the impact of other cultures on identity formation?
4. Who is responsible for the delivery of training on sexual orientation based asylum?
5. What can you tell me about the training received? What does this training consist of, e.g., interview technique, cultural awareness, sexual orientation identity development?
6. Is the training regularly delivered and updated?

### **Interviews**

7. Where an asylum claim involves the incidence of sexual violence, how does this impact upon the (rest of the) interview process and assessment of the claim? How are interviewers and case-owners advised to behave in this situation?
8. How are interviewers guided as to the appropriate range of questions and topics for an asylum claim based on sexual orientation grounds?
9. How are interpreters chosen for the role of interpreting during asylum interviews? Must prospective interpreters fulfill certain selection criteria?
10. What is the UK Border Agency policy where the interpreter selected is of the same country of origin/religion/ethnicity as the asylum applicant?
11. Are interpreters given any training prior to commencing the role?
12. Are there any mechanisms in place to ensure that interpreters with potentially biased or prejudicial views are not tasked with interpreting for an LGB asylum claimant?
13. Is there any monitoring of interviewers and their conduct and questioning during asylum screening interviews?
14. Is there any co-operation or formal working relationship between the asylum interviewer and the decision-maker?

### **Determining Claims**

15. How are the Country of Origin Information Reports collated?
16. Who is responsible for producing these Reports?
17. Can the Reports be said to be objectively produced? Is there a process of independent verification of Country of Origin Information Reports?
18. How does the UKBA ensure that the reports relied upon are accurate and up-to-date?
19. How are such reports interpreted? Is there a realistic way to ensuring consistency of interpretation?
20. What role do Operational Guidance Notes play in the assessment and determination of an asylum claim?
21. How does gender play a role in the assessment of asylum claims based on sexual-orientation grounds?
22. Where objective evidence is unavailable in an asylum claim made on sexual orientation grounds, how is the credibility assessment handled and made in such cases?
23. How would you define or determine the difference between persecution and discrimination within the LGBT refugee context?
24. What is the appropriate persecution threshold? At what point does discrimination cumulatively meet this threshold?
25. How does one come to a decision on credibility?
26. What is the UKBA's understanding of LGBT identity development?
27. Are there resources that are available to interviewers and decision-makers, to assist in understanding the differing developments of identity?
28. How does this understanding fit the context of LGBT asylum, given the diverse cultural backgrounds of the claimants?

### **Housing**

29. In providing housing support for claimants, does the sexual orientation of a claimant have any impact upon the accommodation provided?



## First Freedom of Information Request

UK Border Agency  
Freedom Of Information Act Policy Team  
11<sup>th</sup> Floor  
Lunar House  
40 Wellesley Road  
Croydon  
CR9 2BY

Date: 28<sup>th</sup> March 2013

Dear Sir/Madam

Under the Freedom of Information Act 2000 I seek the following information about the UK Border Agency's assessment of asylum claims made on grounds of sexual orientation:

1. Is the UK Border Agency collating data on asylum claims where sexual orientation is raised as a ground of persecution?
2. In actual figures and as a percentage of total asylum claims, how many times has sexuality been raised as a ground within an asylum claim since the UK Border Agency began collating such data?
3. Can a yearly breakdown be provided in relation to question 2?
4. In actual figures and as a percentage of total asylum claims, how many asylum cases where sexual orientation was flagged as a ground of claim were refused by the UK Border Agency in each year?
5. In actual figures and as a percentage of total asylum claims, how many asylum cases where sexual orientation was flagged as a ground of claim were refused by the UK Border Agency but then overturned at an appeal hearing?
6. In actual figures and as a percentage of total asylum claims, how many asylum cases on grounds of sexual orientation result in an application for leave to move for Judicial Review?
7. What is the average refusal rate of asylum claims overall (on all grounds)?
8. Overall, how many asylum claims (made on any grounds) have their initial refusal overturned at an appeal hearing?
9. Overall, how many asylum claims (made on any grounds) resulted in an application for leave to move for Judicial Review?
10. Is training provided to all asylum interviewers, case-owners, members of the HOPOU and other UK Border Agency staff on matters pertaining to sexual orientation?
11. If so, what is the content of the training?
12. Does this incorporate training on sensitivity when dealing with cases based on a claimant's sexual orientation?
13. Does this also incorporate training on the diverse ways in which sexual identity is developed and how a claimant's culture can impact upon the persecutory narrative and entire asylum process?

14. How is the selection of material for the training done and what sources are used within the training?
15. Who provides this training?
16. Is the training overseen by or conducted in collaboration with the UNHCR or the European Asylum Support Office?
17. Can you clarify what kind of training this is and what it consists of?
18. How long does the training take?
19. How often is it repeated?
20. What training is provided on the interpretation of Country of Origin Information and Country Evidence, particularly in relation to sexual orientation?
21. What form does this training take?
22. Are asylum teams grouped according to experience of a particular country of origin?
23. Are asylum teams grouped according to experience of a particular ground of claim?
24. If so, does this grouping of asylum teams also occur in relation to sexual orientation based asylum claims?
25. What instructions do UK Border Agency staff members receive on the role played by UKBA Operational Guidance Notes in the assessment and decision upon an asylum claim?
26. How much weight is accorded to the Guidance Notes in sexual orientation cases, in terms of how much they can influence the final outcome?
27. How are Operational Guidance Notes developed?
28. Are such Operational Guidance Notes considered to be substitutable for Country of Origin Information?
29. How are interpreters chosen for the interview process?
30. How does the UK Border Agency prevent the personal views of an interpreter, such as their disapproval of an individual's sexual orientation, from impacting upon the atmosphere of an interview and the disclosure of an asylum claimant?
31. Does the UK Border Agency have any means of preventing the personal opinions of case-owners from affecting the outcome of a case, for example, their preconceptions regarding conduct and identity within sexual orientation based asylum claims?

I would prefer to receive this information as a hard copy, in writing. But alternatively, feel free to forward the information electronically to [welfare@imaan.org.uk](mailto:welfare@imaan.org.uk) and [info@imaan.org.uk](mailto:info@imaan.org.uk).

If the decision is made to withhold some of this data using exemptions in the Data Protection Act, please inform me of the same. If some parts of this request are easier to answer than others, please release the available data as soon as possible.

Should you require any further clarification, please do not hesitate to contact me. Please also acknowledge receipt.

I look forward to hearing from you.

Yours sincerely

## Second Freedom of Information Request

UK Border Agency  
Freedom Of Information Act Policy Team  
11<sup>th</sup> Floor  
Lunar House  
40 Wellesley Road  
Croydon  
CR9 2BY

Date: 6<sup>th</sup> May 2014

Dear Sir/Madam

Under the Freedom of Information Act 2000 I seek the following information about the UK Border Agency's assessment of asylum claims made on grounds of gender identity:

32. Is the UK Border Agency collating data on asylum claims where gender identity is raised as a ground of persecution?
33. In actual figures and as a percentage of total asylum claims, how many times has gender identity been raised as a ground within an asylum claim since the UK Border Agency began collating such data?
34. Can a yearly breakdown be provided in relation to question 2?
35. In actual figures and as a percentage of total asylum claims, how many asylum cases where gender identity was flagged as a ground of claim were refused by the UK Border Agency in each year?
36. In actual figures and as a percentage of total asylum claims, how many asylum cases where gender identity was flagged as a ground of claim were refused by the UK Border Agency but then overturned at an appeal hearing?
37. In actual figures and as a percentage of total asylum claims, how many asylum cases on grounds of gender identity result in an application for leave to move for Judicial Review?
38. In my previous Freedom of Information Request, the above questions were asked regarding sexual orientation based asylum claims. The UK Border Agency response stated that the statistics would be released at the end of 2013, but they have not. Can these figures now be supplied with regard to sexual orientation?
39. Is training provided to all asylum interviewers, case-owners, members of the HOPOU and other UK Border Agency staff on matters pertaining to gender identity?
40. If so, what is the content of the training?
41. Does this incorporate training on sensitivity when dealing with cases based on a claimant's gender identity?
42. Does this also incorporate training on the diversity in the experiences of transgender people regarding the point of their self-identification and how a claimant's culture can impact upon the persecutory narrative and entire asylum process?

43. How is the selection of material for the training done and what sources are used within the training?
44. Who provides this training?
45. Is the training overseen by or conducted in collaboration with the UNHCR or the European Asylum Support Office?
46. Can you clarify what kind of training this is and what it consists of?
47. How long does the training take?
48. How often is it repeated?
49. How are Country of Origin Information Reports developed?
50. What training is provided on the interpretation of Country of Origin Information and Country Evidence, particularly in relation gender identity?
51. What form does this training take?
52. What mechanisms are in place for caseworkers to decide LGBT cases where there is an absence of sufficient objective Country Evidence?
53. How are Operational Guidance Notes developed?
54. Is the Country of Origin Information and assessments of a country's situation internally or externally verified?
55. What is the guidance in relation to the use of external country information in LGBT asylum claims?
56. What is the UK Border Agency's guidance to caseworkers on applying the internal protection principle to LGBT asylum claims?
57. What is the UK Border Agency's guidance on how the criminalisation of LGBT identities or sexual intercourse between members of the same sex or by transsexual individuals in claimants' countries of origin must be treated in the evaluation of an asylum claim?
58. Does the UK Border Agency monitor the decisions of LGBT asylum claims in terms of the conduct of the caseworker and quality of decision-making?

I would prefer to receive this information as a hard copy, in writing. But alternatively, feel free to forward the information electronically to [welfare@imaan.org.uk](mailto:welfare@imaan.org.uk) and [info@imaan.org.uk](mailto:info@imaan.org.uk).

If the decision is made to withhold some of this data using exemptions in the Data Protection Act, please inform me of the same. If some parts of this request are easier to answer than others, please release the available data as soon as possible.

Should you require any further clarification, please do not hesitate to contact me. Please also acknowledge receipt.

I look forward to hearing from you.

Yours sincerely

## Communications Regarding Request for Court Access

Tawseef Khan  
127 Old Hall Lane  
Fallowfield  
Manchester  
M14 6HL

Date: 28<sup>th</sup> June 2013

F.A.O. Simon Carr  
Governance Manager  
Senior President's Office  
Room E218  
Royal Courts of Justice  
London  
WC2A 2LL

Dear Mr Carr

I am a PhD candidate at the University of Liverpool, pursuing research into the fairness and efficiency of the British asylum process for sexual minorities. My research project is entitled, 'Re-thinking the British asylum model for sexual orientation-based asylum claims'. As part of my research, I would like to carry out a thorough programme of empirical work, to incorporate the views and experiences of the various stakeholders of the British asylum procedure, from legal representatives, Tribunal Judges, the UK Border Agency and asylum seekers themselves, as I believe that this will yield the most balanced and thoughtful results and contribute to writing up the most nuanced and perceptive thesis possible. Therefore, I am writing to request access to interview a sample of five judges from the Immigration and Asylum Chamber (IAC), on how asylum appeals should be decided, where the claim has been made on grounds of sexual orientation, and where judge has relevant experience in deciding several asylum appeals on this ground, how the judges have navigated the decision-making process. The duration of each interview is estimated at one hour, and the entire process will last no longer than 90 minutes per participant. In support of this application for access to judges of the IAC, I am enclosing herewith, the following documents for your kind consideration:-

1. Business Plan
2. List of Interview Questions

Should you require any further information to assist you in reaching an informed decision with regard to my application for access to interview members of the Judiciary, please do not hesitate to contact me.

I look forward to hearing from you.

Yours sincerely

Tawseef Khan

### **Business Plan for Access to the Judiciary**

#### *- Title of Research*

The proposed research is entitled, 'Re-thinking the British asylum model for sexual orientation-based asylum claims.'

#### *- Aims and Objectives*

The objective of the PhD Research is to examine the effectiveness of the British asylum system in determining asylum claims made on the grounds of sexual orientation, given the unique issues faced by lesbian, gay and bisexual (LGB) claimants, both in terms of how they experience persecution and how they experience the asylum process. In light of previous research, the specific objective of the proposed empirical work is to contrast the conclusions drawn by previous researchers with the experiences of the stakeholders who are actively engaged within the asylum procedure e.g. legal representatives, asylum seekers, Tribunal Judges and UK Border Agency staff.

#### *- Methodology*

The research will take a mixed-methods approach towards the research planned and will be largely qualitative in nature. It begins with a preliminary hypothesis that there are a number of issues entrenched within the asylum process which may prejudice the experience of the asylum system for sexual minorities, based on the doctrinal research that has preceded the empirical component of the entire project. The research is a balanced and unbiased exercise in verifying the degree of truth of this hypothesis. Additionally, the researcher has developed an independent analytical framework from an assessment of the previous research, translating the consensus that exists within the academic community on what can be expected by LGB claimants when making their asylum claims, to a model asylum system for LGB claimants, which will be used as the yardstick against which, the entire British asylum system will be examined. Therefore, the research explores the direct impact of the current asylum system upon LGB claimants and their claims for asylum, for the purposes of assessing whether the landmark Supreme Court decision, HJ (Iran), has served to improve the quality of decision-making and overall fairness and efficiency of the British asylum system at all levels.

In explaining the research design, it is important to again summarise the general research question – 'is the asylum system achieving its goal of protecting those individuals fleeing persecution on grounds of their sexual orientation?' In order to obtain an accurate answer to this question, it is important to balance the diverse viewpoints of all the relevant stakeholders. Consequently, in the research, there are three classes of stakeholders whose experiences and perspectives will be considered; a) experts and practitioners specialising in the field of sexual-orientation asylum (i.e. academic experts and legal representatives); b) current or previous claimants of asylum on sexual orientation grounds; and c) decision-makers, such as Tribunal and Appellate Court Judges and Case-owners at the UK Border Agency.

Each interview is estimated to last between 30 and 60 minutes, and the entire interview process will last no longer than 90 minutes, ensuring that participation within the research does not become a burden upon any participant.

- *Benefits of Research to Judiciary (and Public Interest)*

The objectives of the research would not be met adequately if the perspectives and experiences of the judges, key stakeholders within the entire asylum process, were not incorporated. The absence of a crucial stakeholder category would result in the research also failing to achieve triangulation and balancing the concerns and unique perspectives of all parties. Therefore, judicial participation in the research is necessary to ensure the success of the research, particularly due to the empirical focus that has been chosen.

Thus, it is clear how the research would benefit the Judiciary, in incorporating the views and experiences of a sample of judges, ensuring the final product is objective and balanced. Furthermore, the research is of particular benefit to the Judiciary given the possibility that it could prove instructive for the future training of decision-makers and development of the British asylum system.

The research also has significant public interest; it is a rare opportunity to readdress the popular narrative that exists regarding the fair and effective evaluation of asylum claims made on sexual orientation grounds. It is also in the public interest for a legal procedure as contentious and as important as the asylum procedure to be comprehensively and impartially appraised, integrating the experiences of all stakeholders, free of all other agendas that commonly prevail in the public domain.

- *Guarantees*

Anonymity of all participants is guaranteed, unless they specifically wish to represent their views under their names. Thus, members of the Judiciary will not be identified in any component of the research. As a result of the anonymity guarantee and the nature of the research objectives, alongside the way in which the interview questions have been framed (to create a balanced and impartial result), it is absolutely clear that the discretion and independence of the Judiciary will not be impaired. Additionally, there is a conscious effort for the research to be framed solely in terms of legal standards, thereby avoiding the competing agendas of the public discussion on wider issues of immigration numbers and resources, and resolutely eliminating the prospect of members of the Judiciary becoming embroiled in discussions of political sensitivity or controversy. This is supported by the list of the interview questions, enclosed herewith. To further guarantee this, all interviews will be tape-recorded and a transcript of the interview will be available to every participant, for the purposes of notice, clarification and further commentary.

### **Proposed Questions for Judiciary**

1. What are your general impressions of the area of sexual orientation based asylum?
2. How would you appraise the need for training in this area?
3. What training is available for Immigration Judges on sexual orientation based asylum?
  - What does it cover?
  - Is it country of origin/culture specific?
  - How often?
  - How often should training be provided on this topic?
4. What is your approach when questioning a claimant at first-instance appeal? Is their cultural background a consideration in this?
5. How would this approach differ if sexual violence was a part of the claimant's narrative?
6. How important is an exploration of a claimant's sexual practices to their asylum narrative?
7. What is your understanding of LGBT identity development?
8. How does this understanding fit the context of LGBT asylum, given the diverse cultural backgrounds of the claimants?
9. Are there resources that are available to you to assist in understanding the differing developments of identity?
10. Are there guidelines that Immigration Judges should/would follow, akin to the UKBA asylum policy instructions?
11. What can you tell me about the willingness of Immigration Judges to follow the principles/precedents from cases in the appellate courts?
12. When deciding an asylum appeal on sexual orientation grounds, which areas and issues do you explore in your questioning?
13. In your opinion, how much weight should the submission of documentary evidence be placed upon such asylum claims?
14. What role should the submission of Expert Evidence, e.g. psychological reports, play in deciding asylum claims?
15. How useful are Country of Origin Information reports on sexual orientation based persecution – and therefore, what role have they played for you in assessing claims on these grounds?
16. In your experience, how do interpreters affect the dynamic of the appeal hearing?
17. How is an interpreter chosen for a particular hearing? Do you feel they should be chosen according to a differing procedure, in particular within the sexual orientation-based asylum context?
18. How would you define or determine the difference between persecution and discrimination within the LGBT refugee context?
19. What is the appropriate persecution threshold? At what point does discrimination cumulatively meet this threshold?
20. How does one come to a decision on credibility?
21. How useful do you think inconsistency, plausibility and demeanour are, when making a credibility consideration in this context?
22. What are your experiences of the HOPOU attending Tribunals in such cases?
23. What are your experiences of the quality of lawyers and legal representation in sexual orientation based cases?



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Date: 5<sup>th</sup> October 2013

F.A.O. Simon Carr  
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Room E218  
Royal Courts of Justice  
London  
WC2A 2LL

Dear Mr Carr

Thank you for your letter dated 14.08.2013. I hope that my responses to your queries are satisfactory and enable you to proceed with my interview request:

1. I can confirm that I have ethical approval for my research proposal, as a result of which I have already conducted 9 interviews with various legal practitioners specializing in this area of law and another 8 interviews with LGB asylum claimants thus far. The Research Ethics Approval Application Form is to be used by researchers seeking approval from the University Committee on Research Ethics or from an approved School Research Ethics Committee (REC). Chaired by Dr Louise Ackers, whose responsibility it is to take applications for Ethical Approval to the Research Ethics Committee. The task of the REC is to review expeditable ethical applications for research that involves human participants including undergraduate students' dissertations, MA dissertations, PhD dissertations, unfunded Staff research and funded Staff research, and ensure that the proposed research will maintain ethical standards in execution and abide by the ethical guidelines set out by the Committee on Research Ethics, University of Liverpool.

In submitting an application for ethical review the Principal Investigator / Supervisor confirms that:

- staff and students involved in the execution of the study have the relevant training or
- adequate supervision, including health and safety
- the premises where the study is to take place are appropriate
- the research methods are justified and have been peer-reviewed
- any relevant insurance matters have been discussed with the University's Insurance and Risk Manager (i.e. if the research involves overseas sites, children or other vulnerable groups)

My Ethical Approval Reference is SLSJPhd1213/05. For confirmation, please feel free to contact my Chair of the Research Ethics Committee for the School of Law and Social Justice at the University of Liverpool. She can be reached at lawhla@liverpool.ac.uk or on 0151 794 3679. For more information on the Ethical Approval application process, please see the University website at <http://www.liv.ac.uk/researchethics/apply,for,research,ethics/index.htm#Law>

2. There is an extensive amount of research covering the relatively niche area of sexual identity-based asylum claims. Some of the most significant research in the area comes from Jenni Millbank, Nicole LaViolette, Laurie Berg, Catherine Dauvergne, Suzanne Goldberg and the Fleeing Homophobia Report, for example, which has critiqued the status and treatment of LGBT asylum claimants in the UK and in other jurisdictions. A bibliography of the most important publications is attached for your further consideration. However, with the exception of Claire Bennett's recent PhD project, which conducted empirical work into the experiences of lesbian asylum seekers in the British asylum system, none of this work has addressed the experiences of all the stakeholders within the British asylum system from an empirical angle. Furthermore, Bennett's work only focuses on the perspectives of lesbian asylum seekers and does not incorporate the perspective of judges or other stakeholders. Thus, this project is unique for balancing the experiences of all the stakeholders of the British asylum system in LGB asylum claims, for the purposes of triangulation and to make a final assessment of the system that integrates the priorities of all invested parties.
3. The Research Design takes a mixed-methods approach for the fact that in addition to the use of qualitative interviews, the other significant method is the use of documental analysis, including the extensive doctrinal and case-law sources available. Given the lack of empirical focus in the research that has preceded my work and exists in the academic and public domains, the mixed-methods approach of my research, in incorporating the perspectives of the stakeholders of the British asylum system for LGB asylum claimants is important.
4. In light of the submitted concerns, a reduced version of the interview can be conducted that will last no more than 45 minutes. The interview schedule has therefore been edited to reflect the 30-45 minute guide time. It must be reinforced that based on the previous interviews that have been conducted, these interviews should take no longer than 45 minutes.
5. With regard to interview selection, a sample of one to two judges at each appeal stage that an LGB asylum claim can proceed to is requested. Thus, I wish to interview one-two judges each from the First-Tier Tribunal, Upper Tribunal, High Court, Court of Appeal and Supreme Court, across England and Wales. This would simultaneously avoid being too onerous a burden upon the Court Service, whilst also being wholly representative of this particular stakeholder category for the purposes of the research project. Interviewing up to ten Judges and including each level at which such a case could succeed, is comparable with the aim of interviewing ten legal

academics and practitioners, twenty asylum claimants and, if possible, five representatives of the UK Border Agency (as planned in my research). Furthermore, in relation to the ethical concerns of the project, it is also suggested that with regard to the participant selection, no Judge who is currently deciding an appeal concerning a sexual orientation-based asylum is put forward for the interview.

6. In light of your recommendations that the interview schedule is too long and too complex, the schedule has been revised and is enclosed for your kind consideration accordingly. This interview corresponds to the 30-45 minute guide time. The questions are simply phrased, concerning integral and common concepts within the asylum system that all Judges will be extremely familiar with. Thus, it is submitted that answering the questions listed in the interview schedule will not be particularly difficult or complex for the interviewees, as the questions cover the same topics that were also asked of the other stakeholder categories for the purposes of perspective and comparison, and this has not constituted a source of difficulties.
7. The interview data from the Judges interviewed will be analysed in the same way as all the qualitative data. The focus of the PhD chapters follow a deconstruction of the Refugee definition contained in the Refugee Convention, focusing on a particular component in each chapter. This simplifies the task of analyzing and incorporating the empirical data; ahead of writing each Chapter, the transcripts will be assessed for comments pertaining to the issues relevant to that particular chapter and separated for use in that chapter. Each issue will then be discussed with initial reference to the arguments that have been identified in the doctrinal research, to first present and examine the matters of contention, and then will integrate the perspectives of the various stakeholders who have been interviewed. From the doctrinal arguments and the experiences of the stakeholders, preliminary conclusions with regard to the fairness and efficiency of the British asylum system for LGB claimants will therefore be drawn, on each component of either the system itself, or of the refugee determination analysis.
8. With regard to the ethical issues that have been raised by the Judicial Office, it is confirmed that no interviews have been conducted with asylum seekers currently appealing the decisions of their asylum claims. Emphasising the rationale of point 5, it is requested that with regard to sample selection, no judge is selected who is currently presiding over an appeal concerning a sexual orientation based asylum claim, further reducing the likelihood of any ethical concerns. Furthermore, the research project, in identifying the potential for ethical conflicts, will not interview any asylum claimants whose appeals are still pending. In relation to the second ethical issue, it is clarified that the waiving of anonymity has only been an option available for the legal academics and practitioners, either because they represent a Non-Governmental Organisation, or because they wish for their academic ideas to be appropriately referenced. However, for all other participants, anonymity will be maintained, including for all participating Judges, in full acknowledgement of the negative implications that could derive from the identification of a Judge.

I look forward to hearing from you.

Yours sincerely

Tawseef Khan

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## APPENDIX B

**TABLE MAPPING THEORETICAL FRAMEWORK OF THE  
‘STRUCTURAL PRINCIPLES’**

<b>Fairness:</b>	<b>UK Administrative Law</b>	<b>ECHR</b>	<b>EU Law</b>	<b>Structural Principle</b>
Substantive	Right to Fair Trial  <i>(Ridge v. Baldwin</i> [1964] AC 40  <i>Re HK</i> [1967] 2 QB 617)	Articles 1-9, for example  Article 13	Recital 10, preamble to the Qualification Directive  Recitals 6-7, preamble to the Reception Directive  Article 21, Charter of Fundamental Rights	Respect for UK’s broader fundamental rights obligations in asylum context
Substantive	Right to Fair Trial (See above)	1967 Protocol to the Convention		Embracing RC as ‘living’ document
Substantive	Right to Fair Trial (See above)	<i>Travaux préparatoires</i>	Article 8(2)(c), Procedures Directive  Article 9, Qualification Directive (especially 9(2))	Applying evidentiary thresholds flexibly
Procedural	Right to Legal Representation  <i>(Pett v. Greyhound Racing Association Ltd</i> [1969] 1 QB 125)		Article 15, Procedures Directive	Competent and Skilled Legal Representation
Procedural	<u>Right to Notice/Reasons</u>		Articles 8(2)(b), 9 and 10, Procedures	Application and Citation of Relevant

	<p>(<i>Kanda v. Government of Malaysia</i> [1962] AC 322)</p> <p><i>R v. SSHD, Ex Parte Doody</i> [1994] 1 AC 531 HL)</p> <p><u>Right to Consultation before Benefit is Denied</u></p> <p>(<i>Schmidt v. Secretary of State for Home Affairs</i> [1969] 2 Ch. 149)</p> <p><i>McInnes v. Onslow-Fane</i> [1978] 1 WLR 1520)</p>		<p>Directive</p> <p>Article 41(2) Charter of Fundamental Rights</p>	Guidance
Procedural	<p>Rule against Bias</p> <p>(<i>R v. Gough</i> (1993) AC 646)</p> <p><i>Porter v. Magill</i> [2002] 2 AC 357 HL)</p>	Article 14 (non-discrimination)	<p>Article 8(2)(a), Procedures Directive</p> <p>Article 41(1) Charter of Fundamental Rights</p>	Rule Against Bias
Procedural	Based on Rights to Notice/Reasons and Consultation (See above)		Recital 10 and Article 8(2)(c), Procedures Directive	High Quality Recruitment and Training of Decision-Makers

## APPENDIX C

### Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

#### 8. Claimant's credibility

(1) In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this section applies.

(2) This section applies to any behaviour by the claimant that the deciding authority thinks—

- (a) is designed or likely to conceal information,
- (b) is designed or likely to mislead, or
- (c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant.

(3) Without prejudice to the generality of subsection (2) the following kinds of behaviour shall be treated as designed or likely to conceal information or to mislead—

- (a) failure without reasonable explanation to produce a passport on request to an immigration officer or to the Secretary of State,
- (b) the production of a document which is not a valid passport as if it were,
- (c) the destruction, alteration or disposal, in each case without reasonable explanation, of a passport,
- (d) the destruction, alteration or disposal, in each case without reasonable explanation, of a ticket or other document connected with travel, and
- (e) failure without reasonable explanation to answer a question asked by a deciding authority.

(4) This section also applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country.

(5) This section also applies to failure by the claimant to make an asylum claim or human rights claim before being notified of an immigration decision, unless the claim relies wholly on matters arising after the notification.

(6) This section also applies to failure by the claimant to make an asylum claim or human rights claim before being arrested under an immigration provision, unless—

- (a) he had no reasonable opportunity to make the claim before the arrest, or
- (b) the claim relies wholly on matters arising after the arrest.

(7) In this section—

“asylum claim” has the meaning given by section 113(1) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (subject to subsection (9) below),

“deciding authority” means—

- (a) an immigration officer,
- (b) the Secretary of State,
- (c) the Asylum and Immigration Tribunal, or
- (d) the Special Immigration Appeals Commission,



“human rights claim” has the meaning given by section 113(1) of the Nationality, Immigration and Asylum Act 2002 (subject to subsection (9) below),

“immigration decision” means—

- (a) refusal of leave to enter the United Kingdom,
- (b) refusal to vary a person’s leave to enter or remain in the United Kingdom,
- (c) grant of leave to enter or remain in the United Kingdom,
- (d) a decision that a person is to be removed from the United Kingdom by way of directions under section 10(1)(a), (b), (ba) or (c) of the Immigration and Asylum Act 1999 (c. 33) (removal of persons unlawfully in United Kingdom),
- (e) a decision that a person is to be removed from the United Kingdom by way of directions under paragraphs 8 to 12 of Schedule 2 to the Immigration Act 1971 (c. 77) (control of entry: removal),
- (f) a decision to make a deportation order under section 5(1) of that Act, and
- (g) a decision to take action in relation to a person in connection with extradition from the United Kingdom,

“immigration provision” means—

- (a) sections 28A, 28AA, 28B, 28C and 28CA of the Immigration Act 1971 (immigration offences: enforcement),
  - (b) paragraph 17 of Schedule 2 to that Act (control of entry),
  - (c) section 14 of this Act, and
  - (d) a provision of the Extradition Act 1989 (c. 33) or 2003 (c. 41),
- “notified” means notified in such manner as may be specified by regulations made by the Secretary of State,

“passport” includes a document which relates to a national of a country other than the United Kingdom and which is designed to serve the same purpose as a passport, and

“safe country” means a country to which Part 2 of Schedule 3 applies.

(8) A passport produced by or on behalf of a person is valid for the purposes of subsection (3)(b) if it—

- (a) relates to the person by whom or on whose behalf it is produced,
- (b) has not been altered otherwise than by or with the permission of the authority who issued it, and
- (c) was not obtained by deception.

(9) In subsection (4) a reference to an asylum claim or human rights claim shall be treated as including a reference to a claim of entitlement to remain in a country other than the United Kingdom made by reference to the rights that a person invokes in making an asylum claim or a human rights claim in the United Kingdom.

(10) Regulations under subsection (7) specifying a manner of notification may, in particular—

- (a) apply or refer to regulations under section 105 of the Nationality, Immigration and Asylum Act 2002 (c. 41) (notice of immigration decisions);
- (b) make provision similar to provision that is or could be made by regulations under that section;
- (c) modify a provision of regulations under that section in its effect for the purpose of regulations under this section;

(d) provide for notice to be treated as received at a specified time if sent to a specified class of place in a specified manner.

(11) Regulations under subsection (7) specifying a manner of notification—

(a) may make incidental, consequential or transitional provision,

(b) shall be made by statutory instrument, and

(c) shall be subject to annulment in pursuance of a resolution of either House of Parliament.

This section shall not prevent a deciding authority from determining not to believe a statement on the grounds of behaviour to which this section does not apply.

Before the coming into force of section 26 a reference in this section to the Asylum and Immigration Tribunal shall be treated as a reference to—

(a) an adjudicator appointed, or treated as if appointed, under section 81 of the Nationality, Immigration and Asylum Act 2002 (c. 41) (appeals), and

(b) the Immigration Appeal Tribunal.

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